72-910

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IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1972

No. 72-910

THE STATE OF MONTANA, ex. rel. STANLEY C. BURGER,
Petitioner

vs.

FORREST H. ANDERSON, as Governor of the State of Montana,
Respondent,

and
RELATOR
WILLIAM F. CASHMORE, M.D.,
Respondent,

and
INTERVENORS
LEO GRAYBILL, JR., JOHN TOOLE, BRUCE BROWN, DOROTHY ECK, and JEAN BOWMAN,
Respondents,
ROBERT L. KELLEHER,
Respondent,
STATE OF MONTANA and FORREST H. ANDERSON, Governor, and ROBERT L. WOODAHL, Attorney General,
Respondents,
DAVE M. MANNING, CLYDE HAWKS, CARL M. SMITH, WALTER HOPE, JESS J. BLANKENSHIP, and HERBERT J. KLINDT,
Respondents,

PETITION FOR A WRIT OF CERTIORARI OF THE DECISION OF THE SUPREME COURT OF THE STATE OF MONTANA

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The Petitioner, Stanley C. Burger, prays that a writ of certiorari issue to review the Order of the Supreme Court of the State of Montana rendered in these proceedings on September 25, 1972, denying a Petition for Rehearing of the previous Opinion and Judgment dated August 18, 1972.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Montana, as yet unreported officially, but reported in Volume 29 Montana State Reporter at Page 653, appears at Appendix A, infra, pp. 27, and the Order of the Court denying Petition for Rehearing, as yet unreported, appears at Appendix B, infra, pp. 76.

JURISDICTION

The Opinion of the Montana Supreme Court was filed on August 18, 1972. Petition for Rehearing was filed September 5, 1972, within the time provided by Montana law and Order of the Chief Justice of the Montana Supreme Court (document numbered 61 of the record of the Montana Supreme Court on file herein). The Order of the Montana Supreme Court denying Petition for Rehearing was filed on September 25, 1972 (document numbered 73 of the record of the Montana Supreme Court). This Petition for Certiorari was filed less than ninety (90) days from September 25, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

The Petitioner, Stanley C. Burger, brought suit originally in the Supreme Court of the State of Montana, File No. 12310, seeking declaratory judgment as to whether a proposed new Constitution for the State of Montana was adopted at a special election held in the

State of Montana on June 6, 1972. In the alternative, a writ of injunction or other remedial relief was requested. This suit was consolidated for hearing with a companion action, No. 12309, brought by William F. Cashmore, M.D., seeking identical relief, under Order of the Montana Supreme Court dated June 22, 1972, as appears in Appendix C, infra, pp. 77. Thereafter certain other parties, named as Respondents herein, were allowed to intervene, and numerous Briefs of Amicus Curiae were also permitted to be filed by the Court.

THE QUESTIONS THEREBY ARISING ARE:

1. Whether the action of the majority of the Montana Supreme Court in holding that the proposed new Constitution for the State of Montana was adopted in in accordance with the provisions of Article XIX, Section 8, of the Montana Constitution is consistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. Whether the action of the majority of the Montana Supreme Court in holding that the proposed new Constitution for the State of Montana was adopted in accordance with the provision of Article XIX, Section 8, of the Montana Constitution, is consistent with the Equal Protection Clause of the said Fourteenth Amendment.

3. Whether the action of the majority of the Montana Supreme Court in holding that the proposed new Constitution for the State of Montana was adopted in accordance with the provision of Article XIX, Section 8, of the Montana Constitution, is consistent with the Guarantee of a Republican Form of Government Clause in Article IV, Section 4, of the United States Constitution.

4. Whether the decision of the majority of the Montana Supreme Court in declaring that a vote of electors

on the question of adopting a revised Montana Constitution is subject to review and reversal by the Supreme Court of the United States, under Article VI, of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF MONTANA, ARTICLE XIX, SECTION 8, as found in Volume One, Part 1, at Pages 313-314, of the revised Codes of Montana, 1947:

> "The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter, or amend this constitution; and if a majority of those voting on the question shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof. The number of members of the convention shall be the same as that of the house of representatives, and they shall be elected in the same manner, at the same places, and in the same districts. The legislative assembly shall in the act calling the convention designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the paying of the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the constitution of the United States and of the State of Montana, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations

or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; *and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect.*" (emphasis supplied)

CONSTITUTION OF MONTANA, ORDINANCE NO. 1, FIFTH, (Vol. 1, Part 1, Revised Codes of Montana, Page 329):

"That on behalf of the people of Montana, we in convention assembled, do adopt the Constitution of the United States."

CONSTITUTION OF MONTANA, ORDINANCE NO. 1, SIXTH (Vol. 1, Part 1, Revised Codes of Montana, Page 329):

"That the ordinance in this Article shall be irrevocable without the consent of the United States and the people of Montana."

CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 10:

"No state shall . . . pass any . . . ex post facto law . . ."

CONSTITUTION OF THE UNITED STATES, ARTICLE IV, SECTION 4:

"The United States shall guarantee to every state in this Union a republican form of government . . ."

CONSTITUTION OF THE UNITED STATES, ARTICLE VI:

"This Constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, SECTION 1:

" . . . nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The facts material to the questions presented by this Petition are as follows:

The Petitioner, Stanley C. Burger, is a citizen and resident, elector and taxpayer of the State of Montana, and voted at the election on June 6, 1972. Pursuant to Article XIX, Section 8, of the Montana Constitution and as provided by the Montana Legislature in Laws 1969, Ch. 65, at a general election held on November 3, 1970, the electors of the State of Montana voted to call a Montana Constitutional Convention for the purpose of considering altering, revising or amending the Montana Constitution. Thereafter, the Forty-Second Session of the Legislative Assembly of the State of Montana enacted Chapter 296 of the Laws of 1971, augmenting Article XIX, Section 8, by providing for a Constitutional Convention. Pursuant thereto, one hundred (100) constitutional delegates were elected from throughout the State of Montana, convened, held hearings, debated, and finally adjourned on March 24, 1972. The Convention authorized the preparation of a ballot to be submitted to the electors of Montana at a special election to be held in conjunction with a State Primary election on June 6, 1972. The new Constitution was to become effective July 1, 1973. The ballot contained four issues, as follows:

"

1.

(Vote for One)

FOR the proposed Constitution.

AGAINST the proposed Constitution.

The proposed Constitution will include a bicameral (2 houses) legislature unless a majority of those voting in this election vote for a unicameral (1 house) legislature in Issue 2.

2.

(Vote for One)

2A. FOR a unicameral (1 house) legislature.

2B. FOR a bicameral (2 houses) legislature.

3.

(Vote for One)

3A. FOR allowing the people or the legislature to authorize gambling.

3B. AGAINST allowing the people or the legislature to authorize gambling.

4.

(Vote for One)

4A. FOR the death penalty.

4B. AGAINST the death penalty."

Copy of the Official Ballot appears at Appendix D, infra, pp. 81.

Chapter 296 of the Laws of Montana, 1971, Section 17, Subsection (9) provided that:

> "If a majority of the electors voting at the special election shall vote for the proposals of the convention the governor shall by his proclamation declare the proposals to have been adopted by the people of Montana. . . "

As a result of the election held on June 6, 1972, an official State Canvass of Votes was conducted, and on June 20, 1972, the State Canvass Board, consisting of the Secretary of State, Governor, and State Treasurer executed their Certificate of the Abstract of the voting, a copy of which appears at Appendix E, infra, pp. 82. The results showed:

"FOR the proposed Constitution.	116,415
AGAINST the proposed Constitution.	113,883
2A. FOR a unicameral (1 house) legislature	95,259
2B. FOR a bicameral (2 houses) legislature.	122,425
3A. FOR allowing the people or the legislature to authorize gambling.	139,382
3B. AGAINST allowing the people or the legislature to authorize gambling.	88,743
4A. FOR the death penalty.	147,023
4B. AGAINST The death penalty.	77,733
TOTAL number of electors voting.	237,600"

As the Canvass Board determined that there were 237,600 electors who voted the ballot, mathematically this required that 118,801 electors must have voted for a particular issue on the ballot, in order for that issue to have been adopted pursuant to Article XIX, Section 8, of the Montana Constitution, which reads:

> " . . . and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect."

However, in spite of the mathematical requirement that 118,801 electors must have voted for the proposed Constitution, being Issue Number 1 on the ballot, and in spite of the fact that only 116,415 electors actually voted for the proposed Constitution, according to the Official State Canvass, Forrest H. Anderson, as Governor of the State of Montana, did issue, on June 20, 1972, a proclamation that declared that the proposed Constitution had been adopted by the people of Montana.

The proclamation of the Governor ignored the plain

meaning of the language of Article XIX, Section 8, of the Montana Constitution, and the direction of the State Legislature, which established that the criteria for adoption of any issue, was to be based upon the number of electors "voting at the election". Instead, the Governor chose to use an unauthorized criteria for determining adoption, that being whether the majority of the electors "voting on the issue" voted for it. The Supreme Court of Montana, in a 3 to 2 decision, declared that the Governor's adoption criteria was correct and affirmed his proclamation.

Of the four (4) issues submitted to the electors at the election, 230,298 electors marked their ballot for or against Issue Number 1. 217,684 electors marked their ballot for or against Issue Number 2. 228,125 electors marked their ballot for or against Issue Number 3. And, 224,756 electors marked their ballot for or against Issue Number 4. Thus, it was obvious that many electors did not vote on all four issues, but chose to vote only on one or more of the issues, in various combinations too numerous to compute without a formal State Canvass specifically designated to determine that very question.

As part of the original proceedings, the Governor of Montana filed an Affidavit wherein he attempted to impeach his own official canvass, by declaring that the figure of 237,600 "electors voting" as appeared on the Canvass Certificate, did not actually represent the true number of electors who voted a valid ballot at the election. The Governor, in his Affidavit, offered no evidence of just how many electors did actually vote a valid ballot. The three majority Justices of the Supreme Court of Montana, in their Opinion and Judgment on August 18, 1972, and subsequent Order Denying Petition for Rehearing, dated September 25, 1972, then announced that they could, by a specified procedure, determine exactly how many electors actually voted in the election, without

the necessity of a recanvass and refused to order an additional canvass or order a new election to be held. In reality, they chose to merely make a guess as to the particular voting pattern of the electors at the election. It was mathematically demonstrated to the Justices in the Petition for Rehearing that under the reasoning attempted by the Court, using a simple example of five (5) possible voters, that the Montana Court's theory was a pure guess and had only a 20% chance of being correct.

The Federal questions sought to be reviewed were raised in the Complaint of Intervention of Dave M. Manning, et. al., (document numbered 38 of record of Montana Supreme Court), Brief of Intervenors, Dave M. Manning, et al., (pp. 11-13, document numbered 45 of record of Montana Supreme Court), Brief of Franklin Longan, Amicus Curiae, (p. 2, document numbered 57 of record of Montana Supreme Court), Brief of A. W. Scribner, Amicus Curiae, (pp. 6-8, document numbered 47 of record of Montana Supreme Court), and Petition for Rehearing by this Petitioner, (pp. 9-11, document numbered 63 of record of Montana Supreme Court). In addition, the issue of debasement and dilution of an elector's vote was raised by Brief of Attorney General Robert L. Woodahl, (pp. 19-20, document numbered 55 of record of Montana Supreme Court). The Montana Supreme Court, at pp. 6-7 of the official Majority Opinion, acknowledged that the "due process" and "equal protection of the laws" clauses of the Fourteenth Amendment to the United States Constitution were in issue in this case concerning the debasement and dilution of an elector's vote. (See pp. 34 of Appendix A) However, the majority opinion of the Montana Supreme Court tacitly found no violation of the Fourteenth Amendment and refused to even acknowledge that their Opinion retroactively diluted and debased the voting rights of the electors of Montana.

REASONS FOR GRANTING THE WRIT

1. THE MAJORITY DECISION OF THE SUPREME COURT OF MONTANA WAS ARBITRARY AND CAPRICIOUS AND CONTRARY TO FUNDAMENTAL PRINCIPLES OF JUSTICE SO AS TO BE INCONSISTENT WITH THE DUE PROCESS PRINCIPLES.

The majority opinion of the Supreme Court of Montana held that the proposed Constitution was adopted at the election on June 6, 1972, despite the fact that it was not approved by a majority of the electors voting at the election, as required by Article XIX, Section 8, of the Montana Constitution. 237,600 electors in Montana voted at the election, according to the official Canvass, and only 116,415 electors voted for the proposed Constitution. As 118,801 votes were required, the Constitution issue failed by 2,386 votes. The rule has been stated in *Wood v. Conneaut Lake Park, Inc.* (3 Cir.) 386 F. 2d 121 (1967), cert. denied, 88 S.Ct. 1160, 391 U.S. 907, 20 L.Ed. 2d 422, as follows:

> "If all the judgments complained of were merely erroneous that would not amount to a denial of due process of law. *American Railway Express Co. v. Commonwealth of Kentucky*, 273 U.S. 269, 47 S.Ct. 353, 71 L.Ed 639. However, if a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the Court so deciding had jurisdiction over the suit, the judgment may be in violation of the Fourteenth Amendment. *Postal Telegraph Cable Co. v. Newport, Ky.*, 247 U.S. 464, 38 S.Ct. 566, 62 L.Ed. 1215." *Williams v. Tooke*, 108 F. 2d 758, 759 (5 Cir. 1940), cert. denied, 311 U.S. 655, 61 S.Ct. 8, 85 L.Ed. 419 (1940).

The majority opinion recognized and admitted that the words "electors voting at the election" taken in their literal sense, supports the proposition that the proposed Constitution would pass only if it received approval by a majority of the electors voting at the election, which it clearly did not. The majority opinion further acknowledged the time-honored rule that in determining the framers' intent, resort must first be made to the plain meaning of the words used. *Dunphy v. Anaconda Co.*, 151 Mont. 76, 438 P. 2d 660. The majority opinion also acknowledged that in construing a constitutional provision, the function of the Court is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted or to omit what has been inserted. However, the majority opinion then arbitrarily determined that it would find an ambiguity in the language, which they previously admitted had a plain, literal meaning, requiring no construction or interpretation. The majority's arbitrariness is best exhibited in the following crucial portion of its Opinion found on Page 10 of the official Opinion:

> "Applying these rules to the quoted constitutional language, a literal construction would seem to support relators. The quoted language speaks of approval 'by a majority of electors voting at the election.' But voting on what? The constitutional language does not expressly answer this. However, the substance of the language of the entire provision indicates that it refers to voting on approval or rejection of the proposed constitution, and it is to that question that the quoted language is directed. There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection

of the proposed constitution itself. The best that can be said for relators is that the quoted language is ambiguous when read in connection with the entire constitutional provision relating to submission of the proposed constitution to the electors."
(See pp. 37 of Appendix A)

As to the posed question of "voting on what", the language of Article XIX, Section 8, of the Montana Constitution of "electors voting at the election" gives as clear an answer as one could ever have. "Voting at the election" can only mean voting a ballot by marking one or more of the issues on the ballot and depositing it in a ballot box. The majority opinion admitted this on Page 15 of its Opinion. (See Page 43 of Appendix A) There is no election law in Montana that requires a voter to mark all issues on the ballot. He has "voted" if he properly marks one or more of the issues. Since the State Canvass Board found 237,600 electors voted at the election, the Montana Constitution required 118,801 votes for the Constitution before it was adopted.

To avoid the clear and obvious, however, the majority opinion then made the most capricious of statements, by reciting that:

> "There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection of the proposed constitution itself."

First of all, if this statement is correct, then the Constitutional Convention submitted a ballot to the voters which was not authorized by the Constitution of the State of Montana, nor the legislature, and the whole election should have been declared void right then and there.

Secondly, however, Article XIX, Section 8, of the Montana Constitution has numerous references to multiple issue ballots. For example, the provision provides:

> "Said convention shall meet within three months after such election and prepare such revisions, alterations, or amendments to the constitution as may be deemed necessary . . ."

The use of the plural makes it clear that the framers of the original Montana Constitution contemplated multiple issues on revisions, alterations, or amendments. A most unsettling fact is that the Justices who participated in the majority opinion signed a unanimous opinion by the Montana Supreme Court a year prior, in *Forty-Second Legislative Assembly v. Lennon*, 156 Mont. 416, 427, 481 P. 2d 330, 338, (1971) wherein these same Justices held that the framers of Article XIX, Section 8, of the Montana Constitution did contemplate multiple issue ballots. They thus authorized the Constitutional Convention to submit multiple issues to the electors. The *Lennon* case was a declaratory judgment action brought by the State Legislature and Secretary of State seeking judicial determination of certain legal rights wth regard to the Constitutional Convention in question.

Thus, these same Justices in 1971, prior to the meeting of the Constitutional Convention, recognized the validity of multiple issue ballots, but after the convention, and the voting on the ballot with multiple issues, the three Justices in the majority opinion now find that multiple issue ballots were never contemplated. By this arbitrary reversal in interpretation, the majority opinion was then able to claim an ambiguity existed, whch ambiguity would allow for judicial interpretation of language which really was clear and required no interpretation. The majority opinion then went on to interpret the clear language of "voting at the election" to mean "voting on the issue".

Thus, the majority opinion held that since 230,298 electors "voted on Issue Number 1" according to the State Canvass, and a majority of those would be 115,150 electors, and since 116,415 electors voted for Issue Number 1, then the issue passed.

The action and reasoning of the majority opinion is more than just an error in judgment. It is an arbitrary and capricious attempt to amend the Constitution of Montana by judicial interpretation and in violation of the Fourteenth Amendment. Not only did the majority opinon disregard the plain, literal meaning of the words of the Montana Constitution "electors voting at the election", but they also arbitrarily chose to disregard a previous controlling decision of the Montana Supreme Court, on the very same subject and very same Constitutional provision. The language of the Montana Constitution, in Article XIX, Section 8, was ratified originally by the people of Montana on October 1, 1889. The three members of the Montana Supreme Court, making up the majority opinion, have no right or power to disregard the plain meaning of the language used by the people, and amend the Montana Constitution under the guise of judicial interpretation seeking to uphold a new Constitution which they may prefer. As recognized by the two members of the minority opinion, one of which is the Chief Justice of the Montana Supreme Court, James T. Harrison, the majority opinion is completely arbitrary and capricious, as being without foundation, contrary to undisputed facts, inconsistent with a recent prior controlling decision, and in violation of settled principles of law. The majority opinion is completely inconsistent with the principles of the due process clause of the Constituton, being contrary to fundamental principles of justice. The aim of the Fourteenth Amendment, due process clause, was to prevent such fundamental unfairness. *State v. Johnson*, (1965) 208 A. 2d 444, 87 N.J. 195.

Further evidence of the arbitrariness and capriciousness of the majority opinion is found in allowing the Governor to impeach his own Certificate of Canvass, and then in disregarding simple mathematics and choosing to make nothing but a pure guess as to the actual number of electors who voted a valid ballot at the election. This also is a violation of the fundamental principles of justice as to the electors of Montana, and they deserve to have this unfairness reviewed by this Court.

2. THE MAJORITY DECISION OF THE SUPREME COURT OF MONTANA AND THE PROCLAMATION OF THE GOVERNOR OF MONTANA DIRECTLY CONFLICTS WITH THE DUE PROCESS AND EQUAL PROTECTION PRINCIPLES ENUNCIATED IN THE *KOHLER* DECISION.

Even if, for sake of argument, the majority opnion could be considered as only an erroneous decision, but not arbitrary and capricious, the result of the opinion still conflicts with the principles of due process and equal protection set forth in *Kohler v. Tugwell,* 292 F. Supp. 978 (1968), affirmed by this Court in 89 S.Ct. 879, 393 U.S. 531, 21 L.Ed. 2d 755. There the Courts have recognized that the due process clause and the equal protection clause of the Fourteenth Amendment protect individuals to the extent that the voters must be properly informed by the ballot used as to the subject of Constitutional amendments, that they be given fair opportunity to consider what they are voting upon, and that they not be deceived by the language of the ballot. The basis of such protection is found upon this Court's previous decision in

Reynolds v. Sims, 377 U.S. 533, 12 L.Ed. 2d 506, 84 S.Ct. 1362, where it was reaffirmed that the Constitution of the United States protects the right of all qualified citizens to vote in State as well as in Federal elections. The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing. In *Reynolds v. Sims,* supra, this Court stated:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

In the situation at bar, the electors of Montana had the right to rely on the plain meaning of the language of their Constitution, that in order for it to be altered, revised, or amended, at an election called by a Constitutional Convention, that each proposed alteration, revision or amendment would be adopted only if it received an affirmative vote by a majority of the electors "voting at the election." The electors of Montana further had the right to rely upon the directions given by the State Legislature to the members of the Constitutional Convention under Chapter 296, of the Laws of 1971, wherein Section 17, Subsection (9) thereof again prescribed that each proposal submitted to the electors would be proclaimed as adopted only if it received an affirmative vote by a "majority of the electors voting at the special election."

The electors of Montana further had the right to rely on the unanimous public decision by the Montana Supreme Court in the case of *Forty-Second Legislative Assembly v. Lennon,* 156 Mont. 416, 427, 481 P. 2d 330, 338, (1971) wherein all the Supreme Court Justices announced their interpretation that Article XIX, Section 8, of the Montana Constitution authorized multiple issues of proposed alterations, revisions and amendments to the

Montana Constitution to appear on the ballot submitted by the Constitutional Convention.

Also, the electors had the right to rely on the representations by the Constitutional Convention itself, when it inserted in the adoption schedule in the proposed Constitution, the statement:

> "This Constitution, if approved by a majority of those voting at the election as provided by the Constitution of 1889, shall take effect on July 1, 1973."

Further than that, a supplement was published and distributed in all major newspapers in Montana, prior to the election, with the aid and advice of several of the Constitutional delegates wherein it was clearly represented that:

> "There is also a special consideration peculiar to the Montana situation. Article XIX, Section 8, of the 1889 Constitution requires that any item the convention submits to the people can be adopted only by a majority of the electors voting at the election. We know that as they go down the ballot voters fail to vote in increasing numbers on each subsequent item. Consequently, the likelihood of a proposition failing for the lack of a majority of those voting in the election increases with the addition of each item on the ballot."
>
> The authors then represented:
>
> "If you fail to vote on any item, you will aid in its defeat."
>
> (Document numbered 38, Complaint of Intervention, Affidavit of R. W. Harris; document numbered 45, P. 12, of the record of the Montana Supreme Court)

Finally, the electors of Montana had the right to rely on the representations and directions as they appeared

on the ballot. As has been noted, the Constitutional Convention submitted its proposed alterations and revisions to the Montana Constitution in four separate issues. The first issue concerned a choice of adopting a basic Constitution. The second issue concerned a choice in the Constitution of a unicameral or a bicameral legislature. The third issue concerned a choice in the Constitution of legalizing gambling. The fourth issue concerned a choice in the Constitution of authorizing the death penalty. The total of these issues would be a new Constitution of Montana. In explaining Issue Number 1, the authors of the ballot stated on the face of the ballot:

> "The proposed Constitution will include a bicameral (2 houses) legislature unless a majority of those voting in this election vote for a unicameral (1 house) legislature in Issue 2."

The electors of Montana were thus told on the ballot itself that Issue Number 2 would be adopted only if a "majority of those voting in this election" voted for Issue Number 2. This is a clear representation that the various issues would be adopted only if a majority of those voting *in* the election, as opposed to voting *on* the issue, voted "For" the particular issue.

Relying upon the clear language in the Constitution, and the previous interpretations by the State Legislature and the State Supreme Court, the electors of Montana went to the polls on June 6, 1972, and voted their ballots, which contained further representations that each of the four issues presented would be adopted only if approved by a majority of the electors voting at the election. Many of the electors exercised their supposed right to selectively vote on only some of the issues, whereby in effect, they would nevertheless effect the adoption or defeat of any of the other issues by marking a vote "for" or "against" only one of the issues, and leaving the rest blank. The

ballot told them this would be the result, as had the Constitution, Legislature, Convention, and Supreme Court.

However, after everyone had voted the way he had chosen, along came the Governor of Montana who, in effect, proclaimed that all of the prior interpretations and representations were wrong, and under some unexplained power, the Governor disregarded the result of the election and the Canvass, and announced that Issue Number 1 on the ballot was adopted. Further, the three majority Justices of the Supreme Court, in the action below, then reaffirmed the Governor's proclamation, reversed its prior ruling issued before the election, and determined that the language "electors voting at the election" doesn't mean what it says, but that it actually means "electors voting on the issue."

In summary, the State of Montana, through its Governor and the 3 to 2 majority of its Supreme Court has destroyed the right of the electors of Montana to rely on the plain reading of the Montana Constitution and to vote at the special election by changing the rules after the game was over, or, as recognized by the current author of the majority opinion in this case, Justice Haswell, in the previous *Lennon* case, 156 Mont. 416, 481 P. 2d 330, 336:

> "To now permit these laws to be substantially changed in midstream . . . is to permit a retroactive dilution of voting rights and a fundamental abuse of the elective franchise of voters . . ."

By the State's actions, the electors were allowed to rely on the represented effect of voting on one or more of the issues presented, and then after the electors had voted, the effect of each such vote was changed. Thus, the State of Montana, through its Governor and then its Supreme Court, altered the ballots of the electors, as pro-

hibited by this Court in *United States v. Classic*, 313 U.S. 299, 315, 85 L.Ed. 1368, 1377, 61 S.Ct. 1031, and it diluted the votes, as prohibited by this Court in *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717, and in *United States v. Saylor*, 322 U.S. 385, 88 L.Ed. 1341, 64 S.Ct. 1101. These matters of misrepresentation and deception were presented to the Montana Supreme Court in the various pleadings and briefs of the many parties and intervenors. The majority opinion of the Court recognized that the Fourteenth Amendment "due process" and "equal protection" clauses were in issue as to the debasement and dilution of the votes of the electors. However, the Justices writing the majority opinion refused to even acknowledge what had taken place, and failed to correct this most fundamental abuse of the elective franchise of the Montana voters—changing the effect of an elector's decision not to vote on an issue after he had voted his ballot. Under Article I, Section 10, of the United States Constitution, States are prohibited from passing any "ex post facto law." Yet, here, the majority opinion does change the effect of an elector's voting decision, ex post facto.

This Court should grant a Writ of Certiorari to give equal protection to the electors of Montana and afford the citizen due process of law. Issue Number 1, on the ballot at the election on June 6, 1972 was not adopted because it did not receive the requisite number of votes for adoption, but, further, even if it did, the whole election is invalid because of the resulting misrepresentations and deception to the electors of Montana. *Gray v. Taylor*, 277 U.S. 51, 33 S.Ct. 199, 57 L.Ed. 413.

3. THE ACTION OF THE GOVERNOR AND THE SUPREME COURT OF MONTANA DENY TO THE ELECTORS OF MONTANA THEIR RIGHT TO A REPUBLICAN FORM OF GOVERNMENT.

As pointed out by Justice Douglas in his opinion in *Baker v. Carr*, 369 U.S. 186, 242, 82 S.Ct. 754, 7 L.Ed. 2d 732, and approved in *Kohler v. Tugwell*, 292 F. Supp. 978, 984, (1968), affirmed in 89 S.Ct. 879, 393 U.S. 531, 21 L.Ed. 2d 755:

> "The right to vote is inherent in the republican form of government."

While the guarantee clause in Section 4, Article IV of the Constitution has not normally been enforced by the Courts, yet, even as stated by Justice Frankfurter in his dissenting opinion in *Baker v. Carr*, supra, of 369 U.S. 297:

> "Article IV, Section 4, is not committed by express constitutional terms to Congress. It is the nature of the controversies arising under it, nothing else, which has made it judicially unenforceable."

In Kohler v. Tugwell, 292 F. Supp. 978, 984-985, Circuit Judge Wisdom discussed Article IV, Section 4 of the United States Constitution, and *Baker v. Carr* and *Reynolds v. Sims*, and stated at Page 984:

> "The question in this case is whether the constitutional amendment was adopted in an unrepublican manner; more specifically, whether the ballot was so misleading that the people were deprived of one of the fundamental rights inherent in a republican government, the right to vote on an amendment to their constitution. The same standards 'judicially manageable' in determining whether the plaintiffs

were deprived of due process would seem to be applicable in determining whether they were deprived of the protection of a republican government. I regard the issue here, therefore, as justiciable under the Guaranty Clause."

Here, where the State, through its Governor and majority of its Supreme Court, have tampered with the right to vote of the electors of Montana, by changing the rules of voting, after the voting was accomplished, in an ex post facto manner, such fundamental wrong is surely a violation by the State of Montana through its executive and judiciary of the guarantee clause to the citizens. The State officials took away the people's right to vote, and to have their vote have the effect as represented to them prior to the election by the State Constitution, the State Legislature, Constitutional Convention, the State Supreme Court, and the ballot itself. Under these facts and circumstances, this Court should make it clear to all states that the right to vote is fundamental to a a republican form of government, guaranteed to the people of the states, and this Court will enforce the guarantee to the people of the State of Montana by granting this Writ of Certiorari and determining the violation of the gaurantee clause. The Court should then enforce it against the officials of the State of Montana by determining that Issue Number 1 on the ballot at the election on June 6, 1972 was not adopted, either because it failed to receive the requisite votes, or because the whole election was void because of the misrepresentation and deception to the electors of Montana.

4. THE JUDGES OF THE SUPREME COURT OF MONTANA ARE BOUND BY THE CONSTITUTION OF THE UNITED STATES, AND DECISION ON A NEW CONSTITUTION THAT DEROGATES A CITIZEN'S RIGHTS PROTECTED UNDER THE EXISTING MONTANA CONSTITUTION IS SUBJECT TO REVIEW AND REVERSAL BY THE SUPREME COURT OF THE UNITED STATES.

Chief Justice James T. Harrison of the Montana Supreme Court in writing the majority opinion in the case of *State ex. rel. Schultz-Lindsay Construction Company, Inc. v. State Board of Equalization*, 1965, 403 P 2d 635, 646, 145 Mont. 380, and after citing Article VI of the United States Constitution, stated:

> "We, as members of the judicial branch of government, must uphold the provisions of the Constitution of the United States, and the Constitution of Montana . . ."

This is the requirement and protection contained in clause Fifth and Sixth of Ordinance 1 of the Montana Constitution and the second clause of Article VI of the United States Constitution.

The authority of the Supreme Court of the United States in matters of this kind is outlined by Justice Brennan in the majority opinion in *Baker v. Carr*, 369 U.S. 186 at Page 201.

In instant case, the citizen is entitled to have the issues reviewed because the entire organic law of the State of Montana is involved. The protection given to the citizens is that a revision of the Montana Constitution must be approved by a majority of electors voting at the election.

When both the executive and judicial branches of Montana do not uphold that protection, then no Constitutional protections are afforded, and such action should be reviewed by this Court, and the majority decision be reversed.

CONCLUSION

The Constitution of Montana as adopted under the Enabling Act of the United States Congress is the fundamental document of government for the people of that state. Utmost caution and review of any attempt to change the Constitution must be maintained to insure freedom to the people of Montana. Since the Montana Supreme Court in its original proceedings is the only legal forum before which these matters have been raised and its five Justices are split three to two in their decision, there is an especially important reason why Writ of Certiorari be granted by this Court to review the actions and decisions of the Montana Court, in light of the Federal protections afforded all citizens of this country. We have here issues of first instance, never before decided by this Court, that are of the highest importance not only to Montana citizens, young and old, rich or poor, and regardless of race, color or creed, but also to all citizens of all states of this Union. The personal right to vote at an election and to have that vote effect the outcome of the election in the way represented prior to the election should be protected. No State Supreme Court should be allowed to change the effect of the vote, ex post facto. A

For Respondent:

Forrest H. Anderson, Governor, Helena, Montana.
Robert L. Woodahl, Attorney General, Helena, Montana.
Charles C. Lovell, Assistant Attorney General, Great Falls, Montana, argued.
William Jensen argued, Assistant Attorney General, Helena, Montana.

Intervenors:

Eugene H. Mahoney argued, Thompson Falls, Montana.
Randall Swanburg argued, Great Falls, Montana.
James E. Murphy argued, Kalispell, Montana.

Amicus Curiae:

John A. Layne III argued, Helena, Montana.

Submitted: July 17, 1972

Decided: Aug. 18, 1972

Filed: Aug. 18, 1972

Thomas J. Kearney
Clerk

Mr. Justice Frank I. Haswell delivered the Opinion of the Court.

This original proceeding seeks a judicial determination by this Court whether the proposed 1972 Montana Constitution was approved and adopted by the electors at the special election of June 6, 1972.

The essential facts are undisputed. The 1969 Montana Legislature provided for a referendum election on the calling of a constitutional convention. Article XIX, Section 8, Montana Constitution; Chapter 65, Session Laws 1969. This election was held on November 3, 1970, at which time the electors approved the calling of a constitutional convention to revise, alter, or amend the present Montana Constitution. Thereafter, the 1971 Legislature enacted the necessary enabling act for such constitutional convention. Chapter 1, Extraordinary Session Laws 1971. The delegates to the constitutional convention were duly elected at the election held on November 2, 1971. The convention convened, held hearings, debated, and eventually agreed upon a proposed 1972 Constitution to be submitted to the electors for their approval or rejection at a special election to be held in conjunction with the primary election on June 6, 1972.

The separate constitutional election ballot is herewith set forth:

"INSTRUCTIONS TO VOTERS: PLACE AN "X" IN THE BOXES WHICH EXPRESS YOUR PREFERENCES. THE FULL TEXT OF THE PROPOSED CONSTITUTION AND THE SEPARATE PROPOSITIONS IS AVAILABLE FOR INSPECTION AT YOUR POLLING PLACE. IF THE PROPOSED CONSTITUTION FAILS TO RECEIVE A MAJORITY OF THE VOTES CAST, ALTERNATE ISSUES ALSO FAIL.

OFFICIAL BALLOT

PROPOSED CONSTITUTION

PLEASE VOTE ON ALL FOUR ISSUES

1.
(Vote for One)

☐ **FOR** the proposed Constitution.

☐ **AGAINST** the proposed Constitution.

The proposed Constitution will include a bicameral (2 houses) legislature unless a majority of those voting in this election vote for a unicameral (1 house) legislature in Issue 2.

2.
(Vote for One)

☐ 2A. **FOR** a unicameral (1 house) legislature.

☐ 2B. **FOR** a bicameral (2 houses) legislature.

3.
(Vote for One)

☐ 3A **FOR** allowing the people or the legislature to authorize gambling.

☐ 3B **AGAINST** allowing the people or the legislature to authorize gambling.

4.
(Vote for One)

☐ 4A **FOR** the death penalty.

☐ 4B **AGAINST** the death penalty. "

Following the election, the election returns were canvassed by the state canvassing board and the results of that canvass were contained in a certificate of the abstract of the votes by the Secretary of State as follows:

"FOR the proposed Constitution.	116,415
"AGAINST the proposed Constitution.	113,883
"2A. FOR a unicameral (1 house) legislature	95,259
"2B. FOR a bicameral (2 houses) legislature	122,425
"3A. FOR allowing the people or the legislature to authorize gambling.	139,382
"3B. AGAINST allowing the people or the legislature to authorize gambling.	88,743
"4A. FOR the death penalty.	147,023
"4B. AGAINST the death penalty.	77,733
"Total number of electors voting.	237,600"

Thereupon the Governor proclaimed the proposed 1972 Montana Constitution approved and adopted.

Relators filed the instant action as an original proceeding in this Court seeking a declaratory judgment that the proposed 1972 Montana Constitution was not ratified and adopted because it was not "approved by a majority of the electors voting at the election" as required by Article XIX, Section 8 of the present Montana Constitution. Relators also sought appropriate remedial writs ancillary thereto. The Governor was named as sole defendant in relators' action.

This Court accepted original jurisdiction, ordered the separate actions filed by the two relators consolidated, and set the consolidated action for adversary hearing.

Prior to the hearing an answer was filed by the Governor, a complaint in intervention was filed by six individuals, the Attorney General intervened as an additional respondent and filed a separate answer, and answers were filed to intervenors' complaint. In all, twenty written briefs were filed by the parties, intervenors, and amici curiae. Oral argument was heard on behalf of all interested parties, including amici curiae. This case was exhaustively briefed and argued.

The ultimate issue for determination can be simply stated: Was the proposed 1972 Montana Constitution "approved by a majority of the electors voting at the election" of June 6, 1972, as required by Article XIX, Section 8, of the present Montana Constitution?

The principal contentions of relators and others who contend the proposed 1972 Montana Constitution did not receive the required majority approval can be summarized in this manner: They contend the phrase "approved by a majority of the electors voting at the election" as provided in Article XIX, Section 8, of the present Montana Constitution means a majority of the electors who cast a valid ballot on any of the four questions on the ballot; that the quoted language speaks for itself and there is nothing for this Court to construe; that the legislature, the constitutional convention commission, and the constitutional convention itself all understood what the constitutional language meant as evidenced by their official acts; and their own interpretation can not be changed now after the election has been held and the vote has become known. They also point out that the Secretary of State's certification of 237,600 as the total number of electors voting is presumptively correct by statute and as there is nothing to indicate such figure is incorrect, the presumption controls. They conclude that because the provisions of the present Constitution on

determining approval or rejection of the proposed constitution are mandatory and exclusive, and because 237,600 electors voted at the election and less than half of that number (116,415) voted for the proposed 1972 Constitution, it lacked the required majority approval to take effect.

On the other hand, the basic thrust of respondents and those who contend the proposed 1972 Constitution received the required majority approval and became effective according to its provisions can be summarized in these words: They take the position that the phrase "approved by a majority of the electors voting at the election" means a majority of electors voting on approval or rejection of the proposed 1972 Constitution, and does not include the electors voting only on one or more of the alternative proposals.

Respondents argue that there is no valid basis for considering nonvotes on approval or rejection of the proposed constitution as votes against its approval, which would be the effect of including as part of the required majority those ballots containing a vote on one or more of the alternative questions which did not contain a vote "for" or "against" the proposed constitution itself. They contend the figure of 237,600 represented as the total number of electors voting in the Secretary of State's certificate is incorrect; that in fact it represents the total number of ballots issued which includes blank ballots, totally void ballots, partially void ballots, and the like; that such ballots cannot be counted in determining the total number of electors voting at the election in computing the required majority vote, but only valid ballots cast can be counted. The Attorney General alternatively argues that if the required majority means a majority of the electors voting on any of the four issues, then the evidence before this Court is insufficient to make that

determination; or this Court should use the issue receiving the largest number of votes (the approval or rejection of the proposed constitution) as a basis for determining the necessary majority; or otherwise those voting in favor of the proposed constitution are denied "due process" and "equal protection of the laws" by dilution of their vote by those not voting on that question in contravention of the Fourteenth Amendment to the United States Constitution.

At the outset we need not concern ourselves with any technical legal question concerning the parties, procedure, the acceptance of original jurisdiction by this Court, and related matters. This Court has previously accepted jurisdiction of this cause, no issues have been raised by the parties on these subjects, and such matters are irrelevant to our decision here. Instead, we direct our exclusive attention to determination of the substantive issue here involved.

Neither do we consider the pleading conflict raised by the Attorney General concerning the meaning and effect of the Secretary of State's certification of the "total number of electors voting" germane. The facts speak for themselves and only legal questions remain for our determination.

Directing our attention to the substantive issue, we observe that Article XIX, Section 8, of the present Montana Constitution provides for a separate election where a constitutional convention submits a proposed new constitution to the voters for their approval or rejection. We quote Article XIX, Section 8, in full, the underlined words being the portion thereof which we are called upon to construe:

> "The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question

whether there shall be a convention to revise, alter, or amend this constitution; and if a majority of those voting on the question shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof. The number of members of the convention shall be the same as that of the house of representatives, and they shall be elected in the same manner, at the same places, and in the same districts. The legislative assembly shall in the act calling the convention designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the constitution of the United States and of the state of Montana, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; *and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect.*" (Emphasis added).

The crux of the issue is whether the underlined quoted language requires a majority of electors voting on approval or rejection of the proposed constitution or whether it requires some other majority.

Relators and other espousing their view contend that the quoted constitutional language is clear and we must declare what it plainly says. They argue that the use of different language in various election provisions of Sections 8 and 9 of Article XIX indicates an intent by the framers of the Montana Constitution to require something more than a simple majority to approve a proposed constitution submitted by a constitutional convention. They conclude that a majority of the total number of electors voting on any of the four questions on the ballot is required to approve the proposed 1972 Montana Constitution.

We note that all parties agree that the act of voting consists of marking a valid ballot that is deposited in the ballot box and counted in the election. Goodell v. Judith Basin County, 70 Mont. 222, 224 P. 1110; Maddox v. Board of State Canvassers, 116 Mont. 217, 149 P.2d 112, stand for the proposition that voting is the affirmative act of marking the ballot and depositing it in the ballot box in conformity with the election laws. Neither signing the registry of voters, nor being issued a ballot, nor having one's name appear on the poll book is enough, standing alone, to constitute the act of voting.

The issue before us is a narrow one but its solution is not simple. We recognize that there are two distinct and opposing lines of authority in other jurisdictions having the same or similar constitutional language. Earlier cases are collected in the Annotation appearing at 131 A.L.R. 1382. For examples of later cases see: State ex rel. Witt v. State Canvassing Board, 78 N.M. 682, 437 P.2d 143; In re Todd, 208 Ind. 168, 193 N.E. 865; Stoliker v. Waite, 359 Mich. 65, 101 N.W.2d 299. These cases are cited merely to indicate the two conflicting lines of authority but are not relied upon or determinative of our decision in the instant case. We prefer to look to

Montana statutes and cases for guidance in interpreting the meaning of our own constitutional provisions.

The rules of statutory construction are equally applicable to interpretation of the meaning of provisions in the Montana Constitution. State ex rel. Gleason v. Stewart, 57 Mont. 397, 188 P. 904; Vaughn & Ragsdale Co. v. State Board, 109 Mont. 52, 96 P.2d 420. In construing the meaning of a statute, the intent of the framers, i.e., the legislature, is paramount. Section 93-401-16, R.C.M. 1947. In determining legislative intent, resort must first be made to the plain meaning of the words used. Dunphy v. Anaconda Co., 151 Mont. 76, 438 P.2d 660, and Montana cases cited therein. In construing a statute, the function of the court is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted nor to omit what has been inserted. Section 93-401-15, R.C.M. 1947. A statute must be read and considered in its entirety and the legislative intent may not be determined from the wording of any particular section or sentence, but only from a consideration of the whole. Home Bldg. & Loan v. Bd. of Equalization, 141 Mont. 113, 375 P.2d 312.

Applying these rules to the quoted constitutional language, a literal construction would seem to support relators. The quoted language speaks of approval "by a majority of electors voting at the election." But voting on what? The constitutional language does not expressly answer this. However, the substance of the language of the entire provision indicates that it refers to voting on approval or rejection of the proposed constitution, and it is to that question that the quoted language is directed. There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection

of the proposed constitution itself. The best that can be said for relators is that the quoted language is ambiguous when read in connection with the entire constitutional provision relating to submission of the proposed constitution to the electors.

We are mindful of the principle that when a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted. Section 93-401-23, R.C.M. 1947. Majority rule is a natural right and fundamental tenet of government in a democracy, and only the strongest evidence that something more than a majority, i.e., an extraordinary majority, is required in a given situation will suffice. Here no such evidence exists.

Nor, in our view, is the difference in language employed in different election provisions of Article XIX controlling, or indicative of an intent by the framers of our Constitution to require approval of a proposed constitution by an extraordinary majority. The first part of Section 8 relating to calling a constitutional convention requires a referendum vote by "a majority of those voting on the question"; Section 9 dealing with submission of individual constitutional amendments by the legislature requires referendum to the qualified electors and approval "by a majority of those voting thereon." That part of Section 8 we are called upon to construe requires submission of the proposed constitution to the electors "at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof" and approval by "a majority of the electors voting at the election."

The reason for the difference in language between these three provisions is readily apparent. The referendum to the voters on the calling of a constitutional convention is normally held at a general election as was done here;

consequently, the phrase requiring "a majority of those voting on the question" was employed to distinguish the constitutional referendum question from other general election issues. The language of Section 9 relating to submission to the electors of individual constitutional amendments proposed by the legislature must be at a general election where up to three such amendments can be submitted at the same election, thus the language "approved by a majority of those voting thereon" is used. The language of Section 8, that we must construe—"a majority of the electors voting at the election" was used because a separate election is required for approval or rejection of a constitution proposed by a constitutional convention and there is no need to differentiate between approval or rejection of a proposed constitution at such separate election and issues at some other election held at the same time. Accordingly, these differences in the language employed by the framers of our Constitution in the different election provisions of Sections 8 and 9 of Article XIX are no evidence of a differing intent on the part of the framers, but are the result of inherent constitutional differences in the elections themselves, which in turn requires different language.

Finally, if the framers of our Constitution had intended to require an extraordinary majority for approval of a proposed constitution submitted by an elected constitutional convention, they could easily have said so. Our Constitution contains several provisions requiring extraordinary majorities, but wherever such requirement is imposed the language is loud, clear and unambiguous. Examples of such provisions are: Changing the seat of government requiring "a vote of two-thirds of all the qualified electors of the state", (Article X, Section 3); overriding the governor's veto of a legislative act which requires that such act shall "be repassed by two-thirds of both houses" in order to become effective, (Article V,

Section 40) and a specific detailed procedure therefor (Article VII, Section 12); submission by the legislature to the electors the question of calling a constitutional convention which requires "a vote of two-thirds of the members elected to each house", (Article XIX, Section 8); submission by the legislature to the electors of individual legislative proposed constitutional amendments which require a vote of "two-thirds of the members elected to each house", (Article XIX, Section 9).

We must also consider the effect of requiring an extraordinary majority in an election by counting the electors who vote on issues other than approval or rejection of the proposed constitution. In 18 counties of this state more electors voted on the gambling issue than voted on approval or rejection of the proposed constitution. If we interpret the constitutional provision in question as requiring the inclusion of these nonvoters on the proposed constitution in determining the required majority for its approval, we are in effect holding that the framers of our Constitution intended to give such abstainers the status of electors voting against the proposed constitution. This we refuse to do in the absence of a clear and unmistakable requirement of an extraordinary majority vote.

Additionally, we must consider the policy and philosophy of government contained in our Constitution as enunciated in numerous cases including Tinkel v. Griffin, 26 Mont. 426, 431, 68 P. 859. There the Court said:

> "The expression 'majority of the electors thereof voting at an election,' etc., clearly means a majority of those who vote, *and not a majority* of all of the electors of the county, or *of those who vote upon any other issue*, at the same or some other time." (Emphasis added).

The philosophy of our Constitution was further explained in this language from *Tinkel*:

"It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence.

"In a recent case the court of appeals of Kentucky, having under consideration a similar constitutional provision, said: 'It is a fundamental principle in our system of government that its affairs are controlled by the consent of the governed, and to that end, it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active, and express their opinion, who direct the affairs of the government, not those who are silent and express no opinion in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted, the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose.' (Montgomery County Fiscal Court v. Trimble, 47 S.W. 773, 42 L.R.A. 738.)"

This Court reaffirmed the rule of *Tinkel* in Morse v. Granite County, 44 Mont. 78, 119 P. 286.

We consider the constitutional philosophy expressed therein concerning the Montana Constitution as valid today as it was when originally expressed three generations ago. We extend that constitutional philosophy to the instant case involving Article XIX, Section 8, and the multiple issue election here involved. Here, we are simply not satisfied that the framers of our Constitution intended to require more than a simple majority vote on approval of the proposed constitution.

Accordingly, we hold that "approval by a majority of electors voting at the election" as used in Article XIX, Section 8, of the Montana Constitution means approval by a majority of the total number of electors casting valid ballots on the question of approval or rejection of the proposed 1972 Montana Constitution. We hold that it does not refer to or include those electors who failed to express an opinion by a vote on that issue. The Secretary of State's certificate shows 116,415 votes in favor of the proposed constitution and 113,883 votes against the proposed constitution and no one contends these figures are incorrect. As these figures carry a presumption of correctness by statute, Section 93-1301-7 (15), R.C.M. 1947, and as there is nothing to indicate otherwise, we hold that the proposed 1972 Montana Constitution was approved by the required majority and the Governor's proclamation thereof was correct.

Even under relators' interpretation of the constitutional requirement in question which we expressly reject, relators still cannot prevail. Relators would require an extraordinary majority to approve the proposed 1972 Montana Constitution, i.e., a majority of the total number of electors voting at the special constitutional election on

any issue. The Secretary of State's certificate of the abstract of votes as determined by the state canvassing board shows "Total number of electors voting. 237,600" which relators contend must be accepted as correct by statute. This figure is clearly incorrect even under relators' interpretation of Article XIX, Section 8.

The Secretary of State by letter dated June 2, 1972, instructed the county clerks and recorders of each county to "enter the total number of electors who are listed on the poll books for the separate election on the proposed constitution on the front of the abstract book for that election". The affidavit of the members of the state canvassing board indicates that the phrase " 'Total number of electors voting', as used in said canvass and certificate, refers to the total number of electors appearing at the polls and receiving ballots, plus the number of electors receiving and returning absentee ballots." The affidavit of the Secretary of State is to the same effect.

An "elector" is a person possessing the legal qualifications that entitle him to vote. State ex rel. Lang v. Furnish, 48 Mont. 28, 134 P. 297. The word "voting" means the affirmative act of marking one's ballot properly and depositing it in the ballot box in conformity with the election laws. Goodell v. Judith Basin County, 70 Mont. 222, 224 P. 1110; Maddox v. Board of State Canvassers, 116 Mont. 217, 149 P.2d 112. Thus "electors voting in the election" within the meaning of Article XIX, Section 8, of the Montana Constitution means those persons entitled to vote who cast a properly marked ballot which is counted in the election. Electors casting blank ballots, unintelligible ballots, fouled, void, or illegal ballots are not included as "electors voting in the election" because their ballots are not entitled to be counted in the election. See section 23-4002(4) and section 23-4003(5), R.C.M. 1947; Peterson v. Billings, 109 Mont. 390, 96 P.2d 922;

Heyfron v. Mahoney, 9 Mont. 497, 24 P. 93. Thus, it is not the total number of electors appearing at the polls and receiving ballots as listed in the poll books that constitutes the total number of "electors voting in the election", but the total number of electors casting properly marked ballots that are counted in the election. Accordingly, the figure of 237,600 labeled "total number of electors voting at the election" on the Secretary of State's certificate is demonstrably incorrect, and the disputable statutory presumption of correctness of such figure (Section 93-1301-7(15)) must yield to the facts.

What then, under relators' interpretation of Article XIX, Section 8, is the correct figure on the total number of electors voting at the election? We can make that determination on the materials before us. If we take the total number of electors who cast ballots that were counted on the issue receiving the largest total vote, this should approximate the total number of electors voting in the election. On a statewide basis, the issue of approval or rejection of the proposed constitution received the highest total vote, 116,415 "for" and 113,883 "against", or a total vote of 230,298.

However, the Secretary of State's printed report of the official canvass, county by county, discloses that the electors in 18 of Montana's 56 counties cast a higher total vote on the gambling issue than on the issue of approval or rejection of the proposed constitution. In those 18 counties 290 more electors cast valid votes that were counted on the gambling issue than upon the issue of the proposed constitution; no other issue on the ballot in the special constitutional election received more total votes cast and counted in any county, with this exception. These 290 electors must be added to the statewide total of electors voting on approval or rejection of the proposed constitution (230,298) in order to get the total number of

electors voting in the election, 230,588. As more than one-half of this 230,588 figure voted "for" the proposed constitution (116,415), "a majority of the electors voting at the election" voted for the proposed 1972 Montana Constitution, even under relators' interpretation of Article XIX, Section 8, of Montana's present Constitution.

The other issues raised not being germane to our decision herein they need not be discussed nor determined in this opinion.

Frank I. Haswell
Associate Justice

We Concur:

Chief Justice

John Conway Harrison

Gene B. Daly

Associate Justices.

Mr. Chief Justice James T. Harrison and Mr. Justice Wesley Castles dissenting:

We dissent.

The majority opinion states "The crux of the issue is whether the underlined quoted language requires a majority of electors voting on approval or rejection of the proposed constitution or whether it requires some other majority." We would hold that the quoted language "a majority of the electors voting at the election", means just what it says. The majority opinion goes on to say "There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection of the proposed constitution itself. The best that can be said for relators is that the quoted language is ambiguous when read in connection with the entire constitutional provision relating to submission of the proposed constitution to the electors."

The majority opinion then goes on to say the language is not ambiguous but is clear, and that the reason for the difference in language between the three provisions in Article XIX. Sections 8 and 9 of the Montana Constitution is "readily apparent".

This is the fourth case to be before this Court involving the effort to amend, revise, or alter the Constitution of this state. The interpretation and language of each of the previous three cases was consistent. But now, we depart from that consistency. The three previous are: 42nd Leg. Assembly v. Lennon, 156 Mont. 416, 427, 431, 481 P.2d 330; Mahoney v. Murray, ... Mont. ....., 496 P.2d 1120, 29 St.Rep. 289; State ex rel. Kvaalen v. Graybill, ... Mont. ....., 496 P.2d 1127, 29 St. Rep. 313.

In *Lennon*, Mr. Justice Haswell had this to say:
"At issue is whether the phrase requiring that constitutional delegates be 'elected in the same manner' as members of the house of representatives appearing in Article XIX, Section 8 of the Constitution refers only to constitutional requirements for the election of state representatives, or whether it encompasses both constitutional and statutory requirements for election of state representatives. We hold that the phrase 'elected in the same manner' means exactly what it plainly says—that constitutional delegates are required to be elected by the same election procedures applicable to election of members of the house of representatives without limitation as to the source of such election procedures be they constitutional or statutory. Had the framers of the Constitution intended to limit this phrase to constitutional requirements only, they would hardly have used this particular language knowing that the Constitution contained only broad requirements for elections in general without specific constitutional procedures applicable to election of representatives. By their language coupled with the absence of specific constitutional procedures applicable to the election of representatives, the framers of our Constitution must have intended the requirement to apply to statutory election procedures for representatives to be subsequently enacted by the legislature and amended from time to time. We remain unimpressed with the applicability to Montana of three cited cases from other states to the contrary: Livingston v. Ogilvie, 43 Ill.2d 9, 250 N.E.2d 138; Baker v. Moorhead, 103 Neb. 811, 174 N.W. 430; and In re Opinion of the Justices, 76 N.H. 586, 79 A. 29. These holdings are understandable under their particular state history and their particular constitutional provisions, but their application to

Montana in the light of its history and constitutional provisions is entirely unwarranted."

And further

"A further observation, albeit unsolicited, is that since the referendum uses the language 'revise, alter, or amend the constitution' it must have been contemplated that the work of the convention might be partial or total and that the individual parts might be submitted to the people. Therefore each Article might be separately submitted."

Yet here, in the majority opinion, Mr. Justice Haswell states that there is nothing to indicate the framers had in mind a multiple issue ballot. He must have forgotten what he wrote in *Lennon*. Also, he must have ignored the plain meaning of the language in Sections 8 and 9, Article XIX.

Following is our view of the law and our resolution of the problem at issue. The issue is a narrow one but the solution is difficult.

Article XIX, Section 8, states:

"The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter, or amend this constitution; and if *a majority of those voting on the question* shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof. The number of members of the convention shall be the same as that of the house of representatives, and they shall be elected in the same manner, at the same places, and in the same districts. The legislative assembly shall in the act calling the convention designate the day, hour and place of its meeting, fix the pay of its members

and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the constitution of the United States and of the state of Montana, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; and unless so submitted *and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect.*" (Emphasis supplied)

Article XIX, Section 9, states:

"Amendments to this constitution may be proposed in either house of the legislative assembly, and if the same shall be voted for by two-thirds of the members elected to each house, such proposed amendments, together with the ayes and nays of each house thereon shall be entered in full on their respective journals; and the secretary of state shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be) for three months previous to the next general election for members to the legislative assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection and *such as are approved by a majority of those voting thereon shall become*

part of the constitution. Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately; provided, however, that not more than three amendments to this constitution shall be submitted at the same election." (Emphasis supplied)

In the foregoing quoted Sections 8 and 9 of Article XIX, the underlined portions show these distinct language differences:

Section 8. In a call for a convention—those voting *on the question.*

Section 8. In approval of a revision—the electors voting *at the election.*

Section 9. In Approval of amendments—Those voting *thereon.*

Our constitutional provisions on voting in different types of elections have other examples of varying language used, e.g.:

Article X, Section 2, concerning the permanent seat of government—"the majority of all the votes upon said question";

Article X, Section 3, concerning a change of the seat of government—"a vote of two-thirds of all the qualified electors of the state voting on that question";

Article XII, Section 9, concerning a statewide tax rate of 2 mills—"a majority of all votes cast for and against it";

Article XIII, Section 2, concerning debt limit—"a majority of the votes cast for and against it";

Article XIII, Section 5, concerning county debt limit

—"a majority of the electors thereof, voting at an election to be provided by law";

Article XVI, Section 2, concerning removal of a county seat—"a majority of the qualified electors of the county at a general election on a proposition to remove the county seat, shall vote therefor";

Article XVI, Section 8, concerning consolidation of counties—"a majority vote of * * * electors in each county * * * expressed at a general or special election held * * *".

The basic issue before this Court should require us to determine the intent of the framers of the Montana Constitution when they adopted Section 8 of Article XIX at the constitutional convention, August 17, 1889. That section reads in part:

> "* * * and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect."

The traditional rules of construction in cases of this kind have been succinctly set forth in the classic decision Knight v. Shelton, (E.D. Ark. 1905), 134 Fed. 423, 426, wherein the court was confronted with the construction of the constitutional provision of the Arkansas Constitution concerning amendment to its constitution. There the court summarized:

> "1. There are certain rules of law which are so well settled that it is unnecessary to refer to authorities to sustain them. Among these are the following: A Constitution can be amended only in the mode therein prescribed. The construction of constitutional provisions is governed by the same rules which apply to the construction of statutes. The language used is

to be given the natural signification that the words imply, in the order and grammatical arrangement in which the framers used them, and if, thus regarded, the words convey a definite meaning which involves no absurdity, and no contradiction between parts of the same writing, then the meaning apparent upon the face of the instrument is the one which alone courts are at liberty to say was intended to be conveyed. If there is no ambiguity in the language used, there is nothing to construe, and courts must follow the letter of the Constitution. It is only when the language used is not clear or unambiguous that courts are permitted to resort to the rules of construction which govern courts in ascertaining the intent of the framers. If any of the provisions are unjust, so that their enforcement will work a hardship to any class of persons, the remedy must come from the people who have adopted them. Construction can furnish no remedy under our system of government."

Under Section 8, the natural significance of the phrase "majority of the electors voting at the election" is that to determine whether the proposed constitution was adopted, you count the total number of electors voting at the election, and one-half plus one must have voted for the measure or it fails.

We shall analyze this interpretation on which, at first blush, the authorities may seem to be split, but there is something we feel reconciles any apparent variance in the cases. That point is that Montana in the recent election of June 6, 1972, treated the vote on the proposed constitution and the three matters submitted with it as a separate election from the regular primary. The fact that the constitutional election was a separate one is conclusively established by the mandatory requirement of Article XIX, Section 8, which states the ratification or rejection

by the people must be by an election *"for that purpose."* This is more clearly pointed out when it is found that the poll books disclose more people voted in the regular primary than voted on the constitutional issue. Also, the facts are that there was a great variance in the number of people who voted on the other three matters referred and on the proposed constitution itself, so it would be pure conjecture to determine who voted on the constitution and who did not.

All briefs touching the point at issue here discuss two Montana cases, Tinkel v. Griffin, 26 Mont. 426, 68 P. 859 and Morse v. Granite County, 44 Mont. 78, 119 P. 286. We shall discuss these cases later after first turning our attention to other authorities.

State ex rel. Hayman v. State Election Board, (1938), 181 Okla. 622, 75 P.2d 861, 862, 864, is a case in which a constitutional amendment was submitted to the voters, and the constitution of Oklahoma provided, in part:

> "If a majority of all the electors voting at such election shall vote in favor of any amendment thereto, it shall thereby become a part of the Constitution."

Oklahoma also has a statute which makes every precinct election board return to the county election board the total number of electors voting at the election so the state election board could certify the total number of ballots cast at the particular election. The same statute requires the county election boards to record the number of ballots spoiled or not voted, all of which is reported to the state election board. The proposed amendment received a affirmative vote of 379,405, and a negative vote of 219,996. The total votes cast as shown by the certificate was 767,745 votes, and the election board determined that the amendment did not pass. An action was brought, and the Oklahoma Supreme Court held that the election board was

correct. The Supreme Court refused to issue the writ to change what the election board had reported, and among other things made the following observation:

> "Under this suggested method, no elector would be considered who did not vote on the office or measure receiving the highest vote, thereby eliminating many voters who, in the instant case, voted only State, county, or precinct ballots. *The inaccuracy and fallibility of this method are conspicuously apparent.* They assert that this number should arbitrarily be considered as representing the number of 'electors voting at such election.' This is predicated upon a presumption which is significantly contrary to the actual and admitted facts as presented in this case. By this method every voter appearing at the polls who did not see fit to cast a vote for presidential electors, but who may have voted for every other State officer, or county or precinct officer, or on the submitted amendment itself, is eliminated from consideration as an 'elector voting at such election.' This is in direct discord with the theory conceded by all parties to this proceeding that every voter appearing at the polls and casting a vote for or against any candidate or measure submitted is to be considered in determining the total number of 'electors voting at such election.'" (Emphasis supplied).

In People v. Stevenson, (1917), 281 Ill. 17, 117 N.E. 747, 749, a constitutional amendment had been submitted to the voters by the legislature. The canvassing board returned that 1,343,381 male electors voted at the election; 656,782 voted for the proposed amendment, and 295,782 voted against it. The canvassing board then determined the highest number of votes cast for the members of the legislative assembly, and since the vote on the constitutional amendment was more than half of the vote

for the members of the assembly, as figured by their formula, the canvassing board determined that the amendment had been adopted. The trial court reviewed the decision of the canvassing board and determined that the amendment had not been adopted. In affirming this decision, the appellate court discussed the 1818 Constitution of Illinois and the 1848 Constitution of Illinois. The decision was given under Section 1, Article 14, of the Constitution of 1870, which provided that "if a majority voting at the election" voted for the amendment, it was carried. The Court made the following observations:

> "It seems to us that the people who read and voted on the adoption of the Constitution would not have understood it to mean that an election at which a constitutional amendment was voted on, whether it was adopted or rejected, was to be determined by the vote of those, only, who voted for members of the General Assembly. A more reasonable understanding, requiring no construction or conjecture, would seem to be that the amendment must receive a majority of the votes cast at the election.
>
> "* * *
>
> "The intention to which force is given in construing constitutional provisions is that which is embodied and expressed in the language of the provisions.
>
> "As a Constitution is dependent upon adoption by the people, the language used will be understood in the sense most obvious to the common understanding.
>
> "The language and words of a Constitution, unless they be technical words and phrases, will be given effect according to their usual and ordinary signification, and courts will not disregard the plain and ordinary meaning of the words used, to search for some other conjectural intention. 6 R.C.L. 52; Law

v. People, 87 Ill. 385; Hills v. City of Chicago, 60 Ill. 86."

The Wyoming Supreme Court in State ex rel. Blair v. Brooks, (1909), 17 Wyo. 344, 99 P. 874, considered a vote on a constitutional amendment. The Wyoming Constitution, in Article 20, Section 1, requires that an amendment receive a majority of the electors. It appeared that 37,561 votes were cast at an election on a constitutional amendment and 12,160 voted in favor of the amendment, and 1,363 voted against the amendment. The Court observed that the cases are in conflict, but that the language used in the Wyoming Constitution referred to the electors of the state so that the matter must carry by more than a majority of those voting on the proposition, and it must be a majority of those who showed themselves to be electors.

In Green v. State Board of Canvassers, (1896), 5 Ida. 130, 47 P. 259,260, the Supreme Court of Idaho had before it a constitutional amendment which was voted upon by the electorate of Idaho to give women suffrage; 12,126 voted for and 6,282 voted against. The board of canvassers reported the amendment as not being adopted and an action ensued. The Idaho State Constitution contains a provision that amendments are approved "if a majority of the electors shall ratify the same". Idaho also has in Article 20, Section 3, a provision similar to ours, "if a majority of all the electors voting at said election shall have voted for a convention * * *." The Idaho Court made a great distinction between the meaning of the two provisions and made the following observation which is important here because of the similarity of the language construed to that to be construed in the instant case:

"If they were, as counsel for defendants contend, intended to mean the same thing, why was not the

same language used? We know of no rule of construction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to us to be the other way. We can understand why the makers of the constitution should apply a different and more stringent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment. It is true, the amendment under consideration is one of vast importance, but so, likewise are the other amendments submitted at the same time. With the character or importance of the amendment we have nothing to do in this consideration. Was the amendment adopted as required by the terms and provisions of the constitution? To hold that it was not is virtually to say that no amendment of the constitution is practicable. In fact, counsel do not strenuously contend for a construction involving such a conclusion, but rather insist that the words 'majority of the electors,' in section 1, should be construed to mean the same as the words 'majority of all the electors voting at such election,' in section 3. Even the authorities cited by counsel do not go to such an extent to sustain such a conclusion."

The reasoning and construction of the Idaho Court is proper and logical. It is a maxim of statutory construction, no less applicable to constitutional law, that "where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Section 93-401-15, R.C.M. 1947. Moreover, the intent of the framers must be determined from the language used in the document. The reasoning of the Idaho Court is consistent with these principles for it gives effect to two differently worded sections "majority of the elec-

tors" and "majority of all electors voting at said election." The apparent intent of the framers to impose a stricter requirement in convening a convention than in ratifying an amendment is also considered.

In Lee v. State of Utah, (1962), 13 Utah 2d 15, 367 P.2d 861, a constitutional amendment relating to wartime and emergency powers of the legislature was submitted to the voters and thereafter was attacked on the grounds that a majority of the electors registered had not voted. The Supreme Court of Utah held that as the majority of electors voting thereon, as provided by their constitution, had voted in favor, the amendment had been ratified.

In Town of Pine Bluffs v. State Board of Equalization, (1958), 79 Wyo. 262, 333 P.2d 700, it was contended that a constitutional amendment was not properly adopted because it was not supported by a majority of the electors of the state although it got a majority of those voting on the proposition. However, it did have a majority also of those voting at that particular election. The argument was that there were more franchised voters in the state taking into consideration all the people who were registered, and as a consequence, it did not receive the support of a majority of the electors. The Court there held, citing Indiana, that a sensible construction had to be applied, and the wording "all electors of the state" are the electors voting at the particular election.

Article XIX, Section 8, of the Montana Constitution relating to the ratification of constitutional revisions after a convention, provides in part that such ratification must be "by a majority of the electors voting at the election." Section 9, relating to the ratification of amendments proposed by the legislature, provides in part that such amendments must be "approved by a majority of those voting thereon." It is this difference in language which dictates that the proposed constitution may have failed.

"[V]oting thereon" as interpreted by the Idaho Court in *Green*, may be taken to mean a count of ayes and nays. "[V]oting at the election" must mean something different and more; that is, all those who cast ballots whether ayes, or nays, on any one of the four issues submitted.

In fact, in Stoliker v. White (1960), 359 Mich. 65, 101 N.W.2d 299, 300, 304, the Court based its decision on such a distinction:

> "The question before us is this: Does the Constitution require a different vote for the call of a constitutional convention than it requires for the adoption of an amendment to the Constitution?
>
> "* * *
>
> "What the Constitution actually says is that the adoption of a constitutional amendment requires *a majority of the electors 'voting thereon,'* whereas a call for a constitutional convention requires a *'a majority of such electors voting at such election.'*
>
> "* * *
>
> "In short, we are now asked to hold that the people did not clearly understand what they were thus doing. We are asked to hold that, despite the 1899 opinion of the Attorney General upon the very issue here presented, despite the unsuccessful legislative attempt to overcome it immediately thereafter, despite the ruling of the Board of State Canvassers that the 1904 proposition had failed to carry for lack of the necessary majority, and despite the re-enactment in the new Constitution of the very language over which all of this turmoil had raged, the people did not really understand the clear meaning of the words they were using, once again, in their new Constitution. (Constitution of 1850, article 20, §2: '* * * in case a majority of the electors so qualified, voting at such

election, shall decide in favor of a convention * * *.' Constitution of 1908, article 17, § 4: '* * * In case a majority of such electors voting at such election shall decide in favor of a convention * * *.') We are to hold that when they required to pass a constitutional amendment a majority of the votes cast thereon, and when they required to call a constitutional convention a majority of the votes cast at such election, they were actually prescribing no difference between the two votes but were in fact merely calling for the same vote on each. All of this we decline to do. The understanding of our people is not so meager. Their distinguished leaders who framed the Constitution were not so inept, so thoughtless, so blind to the issues of the day. From the language used it is clear that they meant to distinguish between the votes required for a simple amendment and those required to call a constitutional convention, and our holding is that they did so distinguish.

"We have thus relied upon the contemporaneous understanding of the people. Their understanding is as relevant today as it was a half-century ago and it has a direct applicability to the situation before us. When the people went to the polls in 1958 to vote upon the question of a constitutional convention, they went with the contemporaneous understanding that a failure to vote upon the constitutional question would have the practical effect of a vote in the negative thereon. Such is not only the clear phrasing of the Constitution but the highest court in the State had unanimously so ruled with respect thereto. We have no way of knowing how many of the 900,000 electors who failed to vote on the issue would have voted in the affirmative thereon, had they voted, or how many who failed to vote did so because of reliance upon the practical effect of their failure to

vote. Obviously we cannot say that the proposition carried nor can we command the Board of State Canvassers, as plaintiff wishes, 'to certify that the revision question carried.' "

There are two Montana cases construing the election provisions of the current Constitution concerning voting on bond elections. In Tinkel v. Griffin, (1902), 26 Mont. 426, 431, 68 P. 859, the Supreme Court had before it a vote in Flathead County for the building of a new county courthouse and jail. The county commissioners had regularly submitted to the voters the matter of the loan. That election was held under Article XIII, Section 5, of the Constitution which contains the following language:

"* * * No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law."

This language is somewhat different than the language in Sections 8 and 9, Article XIX, of the Constitution. The question arose as to what constituted a majority of the electors of the county voting. The Court pointed out that the election could have been held by itself or at any time. As a consequence, the majority of the electors voting at the election to be provided by law would be only those who voted on the bonds themselves.

The Supreme Court treated the election on bonding the county as a special election, although it was held at the same time as the general election. Thus there were two elections the same day. The Court in *Tinkel* said this:

"It appears that the highest number of votes cast for any office voted upon at the election was 2,400, that 1,000 were cast in favor of the issuance of the bonds, and that 462 were cast against it. It thus

clearly appears, counsel say, that the proposition did not receive a majority of the electors voting, within the meaning of Section 5, Article XIII, of the Constitution.

"It will be observed that the requirement is that the approval must be by a majority of the electors of the county voting, not at a general election, but at *an election to be provided by law.*

"As we have seen, such an election has been provided by law to be held at any time it may be deemed necessary by the board of commissioners. It happens, also, that the manner of holding it is the same as that prescribed for general elections. Thus it may, with perfect propriety, be held at the same time at which a general election is held; but the fact that this is the case does not require a different standard of estimating the majority necessary from that which would govern if the election is held on a different day. The evident meaning of the constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at an election,' etc., clearly means a majority of those who vote, and not a majority of all the electors of the county, or of those who vote upon any other issue at the same or some other time. If the election on the issue of a loan had been upon another day, there would have been no question but that it would have had a majority of the electors of the county who voted. It was none the less a special election, within the meaning of the law, though in this particular instance it was held, for convenience, on the day fixed for a general election."

The Court felt that only those who voted on the bond issue should have been counted in determining

whether a majority voted for or against the bonds. We have no argument with that philosophy. *The same argument is applicable to the case at bar because the total number of votes for the proposed constitution may have been less than a majority of those who voted on that separate issue.*

Tinkel was followed by Morse v. Granite County, (1911), 44 Mont. 78, 95, 119 P. 286. There, the county commissioners called an election to submit to the voters the matter of borrowing $50,000 to build a courthouse. The district court of Granite County ruled inter alia that not sufficient voters had voted in favor of the bond and held the bond issue void and ordered an injunction to issue. The Court cited *Tinkel* with approval:

> "'The evident meaning of the Constitution is that the approval must be the result of an expression of a majority of those voting. The expression "majority of the electors thereof voting at an election," etc., clearly means a majority of those who vote, and not a majority of all the electors of the county, or of those who vote upon any other issue at the same or some other time.'"

The Court then went on to say that the laws and the Constitution should be so interpreted as to become useful. A majority of the electors who voted at the election on June 6, 1972, may not have voted *for* the proposed constitution, the same as the Court held in the two Montana cases just cited.

We would find then that "positive assent" is the same as "a majority of the electors voting at the election." This positive assent is referred to by many writers and courts as an extraordinary majority.

The question in the instant case is a majority of what group? Clearly, that of "electors voting at the elec-

tion" is required. What that means under the facts here is the problem.

As related heretofore, the relators' position is simply that the Secretary of State's certified number voting is 237,600 and that answers the question.

But does it?

The respondent says simply that the group "voting at the election" is confined to those voting on issue #1, or as he puts it the "main issue" and that answers the question.

But does it?

We should then attempt to analyze the figure certified by the Secretary of State. The Secretary of State recited that he had computed and determined the votes from the abstracts transmitted to him by the county clerk and recorders of all fifty-six counties. Those abstracts were produced and furnished according to the following instructions dated June 2, 1972:

"TO ALL COUNTY CLERKS AND RECORDERS:

"I have today mailed to you, under separate cover, *abstract books for reporting the vote cast in your county for* (1) state, national and legislative partisan offices, (2) non partisan judicial offices and (3) *the separate election for ratification or rejection of the proposed constitution.*

"Two copies of each of the books are being sent to you. Some counties will receive a set of state at large, national and legislative books for two different legislative districts. The district numbers are entered on the cover of the book. Upon completion *retain one of each for your files*, and return the second copy to this office. The State canvass has been set to begin June 15, 1972, so the abstracts should be sent in time to reach this office by that date.

"In preparing and sending the abstracts:

"(1) Check all totals against precinct entries.

"(2) See that the certificates on the face of the books are properly signed and sealed.

"(3) Please enter the *total number of votes cast taken from your poll book* in the space provided on the front cover of the partisan abstract book.

"(4) It is very important that you enter the *total number of electors who are listed on the poll books* for the separate election on the proposed constitution on the front of the abstract book for that election. Please check this figure carefully for accuracy.

"(5) *Please be sure to use the mailing envelope which is enclosed with the abstract books,* and make the transmittal by *certified mail.* (Sections 19-122 and 23-4015, R.C.M. 1947).

"I look forward to a state canvass with as few technical difficulties as possible, thanks to your usual good help.

"Sincerely yours,
"S/ Frank Murray
"FRANK MURRAY
"Secretary of State"

A form consisting of two pages was furnished with the foregoing instruction letter, as follows:

Proposed Constitution

Number of Electors Voting .....

ELECTION RETURNS

ELECTION FOR THE RATIFICATION OR REJECTION OF THE PROPOSALS OF THE CONSTITUTIONAL CONVENTION, JUNE 6, 1972

For the County of *Cascade*

The undersigned hereby certify that the within constitutes a full, true and complete Abstract of Votes cast in

.....County, at an election held June 6, 1972, for:

Ratification or rejection of the proposals of the Constitutional Convention.

Attest our hands this .....day of June, 1972.

.....
.....
.....
County Canvassing Board

Note: County Canvassing Board must individually sign this certificate.

FILED Office Secretary of State on the .....day of .....1972, at the hour of .....M.

.....
Secretary of State.

By.....Deputy

STATE OF MONTANA }
County of..... } ss.

I, ...County Clerk and Ex-Officio Clerk of the Board of County Canvassers of said County, do hereby certify that the within constitutes a true, full and complete abstract of the number of votes cast in each precinct of said County, for the proposals enumerated herein.

Attest my hand and the seal of said County, hereto affixed this.....day of June, 1972.

OFFICIAL SEAL COUNTY CLERK

.....
County Clerk and Clerk of said Board of County Canvassers of.....County, State of Montana.

By.....

	Ratification or Rejection of the Proposed Constitution	Precinct 1	Precinct 2	Precinct 3	Precinct 4	Precinct 5	Precinct 6	Precinct 7	Precinct 8	Precinct 9	Precinct 10	Precinct 11	Precinct 12	Precinct 13	Precinct 14	
1	1.															
2	FOR THE PROPOSED CONSTITUTION.															
3	AGAINST THE PROPOSED CONSTITUTION.															
4																
5	2.															
6	2A. FOR A UNICAMERAL (1 HOUSE) LEGISLATURE.															
7	2B. FOR A BICAMERAL (2 HOUSES) LEGISLATURE.															
8																
9	3.															
10																
11	3A. FOR ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.															
12																
13	3B. AGAINST ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.															
14																
15	4.															
16	4A. FOR THE DEATH PENALTY.															
17	4B. AGAINST THE DEATH PENALTY.															
18																
19																
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21																
22																
23																
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29																
30																
31																
32																

From the Secretary of State's certificate of canvass it is obvious that some electors did not vote for or against all of the issues on the ballot. A total of 230,298 electors voted on the first issue, 217,684 electors voted on the second issue, 228,125 electors voted on the third issue, and 224,756 electors voted on the fourth issue. The total number of electors voting was certified as 237,600. In a compilation of votes by counties prepared by the Secretary of State from the abstracts, on issue #3 there were 18 counties which had more votes than on issue #1, by a total of 290 votes. This fact, standing alone, demonstrates conclusively that electors voted on the ballot (thus at the election) but did not all vote on issue #1. But of the 7,302 votes difference between the number voting on issue #1 and the total number certified as voting at the election, it is impossible on the record before us to determine how many of that number are actual votes cast or just ballots issued. In other words, does 237,600 represent a net voting figure or a gross figure of those receiving ballots?

> Section 23-4002(4), R.C.M. 1947, provides:
> "A ballot which is not endorsed by the official stamp is void and shall not be counted. A ballot or part of a ballot is void and shall not be counted if the elector's choice cannot be determined. If a part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part."

It is clear that the "number voting" should be the net figure. Further proof of this statement can be found by examining the voting process under our statutes. Since the general election laws are to be followed, sections 23-3601 through 23-3618, R.C.M. 1947, set the procedure for voting. The voting on the proposed constitution was treated as a special election and special poll books were kept on the voting. Section 23-3610 provides that the

person's name must be recorded in the poll book as he voted; provides for the keeping of records for the list of all voters who voted, and a certification by each precinct as to who voted; and provides that the clerk of elections shall keep a list of persons voting. The name of each person who votes must be entered thereon and numbered in the order voting. Such list is known as the poll book. From these poll books each county clerk and recorder should know exactly how many persons voted on the constitution. If the officials followed the law, section 23-3605 provides that unmarked ballots should be returned to the election judges. Section 23-3606 provides that a voter shall receive a new ballot for a spoiled one.

As to the counting and canvassing of the count, sections 23-4001 through 23-4019, R.C.M. 1947, make the provisions. Section 23-4002 provides for a method of handling spoiled or voided ballots and for an actual tally of the number of voters who cast ballots. If the provisions of the law were followed meticulously, the number of votes counted would be all good ballots and result in a net figure.

On the other hand, we have previously set forth in full the Secretary of State's directive or instructions dated June 2, 1972. There he states: "In preparing * * * the abstracts * * * (1) check all totals against precinct entries. * * * (4) It is very important that you enter the *total number of electors who are listed on the poll books* for the separate election on the proposed constitution on the front of the abstract book for that election. Please check this figure carefully for accuracy. * * *"

Note the underlined instructions—*electors listed*. Is that consistent with the figure required by the statutes, electors who voted a valid ballot after the tally of the poll books was adjusted?

We were assured when we assumed jurisdiction of this matter with *no factual* dispute existed. Yet, the Governor's answer admits the allegation of the petition that 237,600 electors voted at the special election and then files with his brief, through the Attorney General, an affidavit of himself, the Secretary of State, and the State Treasurer, constituting the state canvassing board, which asserts that the figure 237,600 was the total number receiving ballots plus absentees, thus a gross figure rather than a net figure as is seemingly admitted in the answer. This presents a fact issue as discussed before—in fact the critical, controlling fact figure.

Examining the tabulation by counties of the two separate elections held on the same day and judged, counted, and canvassed by the same election officials, it appears that in the primary election a total of 238,215 votes were cast, while in the special constitutional election 237,600 votes were cast. Out of those total votes cast, 24 counties show differences between the primary and special election totals, while, significantly, 32 counties show identical totals! Using one example, in Lewis and Clark County, the seat of the State Capitol, 13,867 votes were cast in the primary and 13,867 votes were cast in the special. Can these be possible net figures? Was not a single ballot mutilated or voided for some reason in one or the other election?

Or taking another example from Beaverhead County, the first county listed alphabetically, the total votes cast in the two separate elections is recorded as 2,832, identical in each. Yet in the partisan races for nominations to the United States Senate where two men, including incumbent Senator Metcalf, vied for the Democratic nomination and four men vied for the Republican nomination, a total of 2,391 votes was tallied. 441 voters either did not vote at all on that important race or their ballots were not

properly accounted for. In that same county with nine candidates running for the nomination for governor, a total of 2,686 votes cast was tallied. 146 votes reported as voting on that important office wer not accounted for but significantly 295 more voters expressed a preference here than in the senatorial race. This example demonstrates that voters do not vote on all offices or all issues, but nevertheless *do vote*, and the total number of electors voting at an election cannot be measured by a single issue or office in that particular election.

These questions pose other questions. Did the precinct and county election officials follow the election laws by adjusting or balancing their poll books with the valid ballots? Or, did they follow the Secretary of State's instructions by inserting the number of *electors listed* in their poll books? It appears beyond a doubt that some precincts and some counties did it each way! Thus the figure of 237,600 certified by the Secretary of State likely reflects a combination among counties of net and gross figures. It is a critical fact question that no analysis short of a recanvass by precinct can answer.

It is noted here that no suggestion of fraud, bad faith, irregularity or anything of that nature has been reported or urged in any of the 981 precincts in the entire state. That the election result on the proposed constitution was close is self-apparent—a difference of only 2,532 votes. The proposed constitution was approved in 12 counties and defeated in 44 counties. Would a recanvass affect the result? Who knows, without the correct figure in the formula?

The foregoing should pose a dilemma for this Court. We are aware that the briefs argue on burden of proof and presumptions of law. Each side applies these legal arguments to prove its position. But from our previous discussion it is clear that to change such a basic document

as our Constitution, a clear cut will of the people expressed within the rules laid out in Article XIX, Section 8, is mandatory and should not rest on the niceties and subtleties of the rules on burden of proof and presumptions of law. We are here concerned with hard, cold, mathematical facts which can be determined. This Court has the responsibility to see that the facts are determined.

We would find that the only solution to this problem is to grant a writ of mandamus to compel a recanvass by precinct of the votes cast in the June 2, 1972 election. A canvassing board cannot evade its duties by adjourning without taking the action required by law, and mandamus lies to compel its members to reassemble and perform their duty. A partial or incomplete canvass is viewed in the same manner as a total failure to make a canvass in the first instance, and a writ may issue to compel the board to reassemble and make a complete and accurate canvass of all the returns. This is supported by ample statutory and case law.

In this analysis the first point that must be considered is the statutory law. Sections 23-4007 and 23-4008, R.C.M. 1947, state:

> "23-4007. *Disposition of items by registrar.* (1) When the registrar receives the packages or envelopes, he shall file those containing the ballots voted and detached stubs and the unused ballots and keep them unopened for twelve (12) months. After twelve (12) months, if there is no contest begun in a court or no recount, he shall burn the envelopes without opening them or examining their contents.
>
> "(2) The registrar shall file the envelopes or packages containing the precinct registers, certificates of registration, pollbooks, tally sheets, and oaths of election officers. He shall keep them un-

opened until the commissioners meet to canvass the returns. The commissioners shall open the envelopes or packages.

"(3) Immediately after the returns are canvassed, the registrar shall file the pollbooks, election records, and the papers delivered to the commissioner."

"23-4008. *Disposition of items in event of contest.* If there is a contest within twelve (12) months, the registrar shall keep the envelopes or packages unopened until the contest is finally determined and then destroy them. If the court has custody of the envelopes or packages as evidence, they are in the custody of the court and the registrar shall not destroy them."

There is no dispute that the issue before the Court is an election contest. Did the proposed constitution pass or fail? This contest was filed in this Court and the above cited statutes explicitly and implicitly grant the Court the authority to compel a reexamination of the original canvass in order to determine the exact number of votes, both gross and net, that were cast "for" or "against" the proposed constitution.

We recognize the argument that the time for a recount has expired. However, the legislature has provided exact instructions by which a recount may be held, and this Court readily submits to those instructions.

The legislature has provided for the retention of ballots for a period of 12 months in the event a dispute may arise as to the exact outcome of a given election. This is the case at hand, therefore, the requisite power and means exist for a recanvassing of the June 2, 1972, special election, in order to determine the exact number of electors voting "for" or "against" in that election.

A recanvass is not a new or unusual remedy. In State ex rel. Lynch v. Batani, 103 Mont. 353, 362, 62 P.2d 565, we stated:

> "We think what the court said in the similar case of Capper v. Anderson, 88 Kan. 385, 128 Pac. 207, is applicable here.
>
> "There it was recorded: 'A canvassing board, in ascertaining and registering the effect of the returns, acts in a purely ministerial capacity, and is subject to control by mandamus. * * * The power to compel a canvass implies the power to compel a correct one. A ministerial duty wrongly performed is not performed at all. The correction of an erroneous computation can, of course, be compelled by a court. The mistakes here complained of are substantially of that character. They consist of treating the face of the poll books and tally sheets as indicating a result which a proper consideration of the entire document shows beyond a question to be wrong. Whatever might be the rule in a situation admitting of a substantial difference of opinion, when a court can determine with certainty that the poll books and tally sheets show a certain number of votes to have been cast and counted for a particular candidate, it can require a board of canvassers to give proper effect to that determination."

Case law from other jurisdictions supports the principle expressed in *Lynch*. The following cases stand for the single proposition that a board of canvassers can be reconvened to correctly, accurately, and truly ascertain the result of an election. State v. Mills, 132 W.Va. 580, 53 S.E.2d 416; Eaton v. County Court of Cabell County, 140 W.Va. 498, 85 S.E.2d 648; Kane v. Registrars of Voters of Fall River, 328 Mass. 511, 105 N.E.2d 212; Dotson v. Ritchie, 211 Ark. 789, 202 S.W.2d 603; Maho-

ney v. Board of Supervisors of Elections, 205 Md. 325, 108 A.2d 143; State v. County Court of Logan County, 145 W.Va. 581, 116 S.E.2d 125; and State v. Mercer County Court, 129 W.Va. 584, 41 S.E.2d 855. The list is endless, but the simple proposition exists that this Court has the power through the statutes heretofore cited, and the means, through the granting of a writ, to order a recanvass of the precincts of Montana to determine the total number voting at the special election on the proposed constitution.

We would order the Secretary of State to immediately take action by issuing instructions to the fifty-six county clerk and recorders in Montana to conduct a recanvass by precinct to balance the poll books with the valid ballots to determine the total number of electors voting at the special election.

In filing the foregoing dissent, we recognize the futility of it. By a three to two vote this Court is declaring a new constitution to have been adopted. We believe the majority opinion to be wrong; and therefore dissent.

We are aware that under our proposed solution a recanvass might reveal the same result; that is, that it would show a majority of those voting at the election did approve. If that were to occur, we would be satisfied.

James T. Harrison

Chief Justice

Wesley Castles

Associate Justice.

Appendix B

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

THE STATE OF MONTANA, ex rel
WILLIAM F. CASHMORE, M.D., and
STANLEY C. BURGER,

Relators,

vs.

FORREST H. ANDERSON, as Governor
of the State of Montana,

Respondent.

FILED

ORDER

Petition for rehearing in the above entitled cause is denied.

Dated this 25th day of September, 1972.

Chief Justice

Associate Justices

We would grant the petition.

Chief Justice

Associate Justice

Appendix C

IN THE SUPREME COURT OF
THE STATE OF MONTANA

No. 12309

THE STATE OF MONTANA, ex rel.
WILLIAM F. CASHMORE, M.D., and
STANLEY C. BURGER,

Relators,

vs.

FORREST H. ANDERSON, as Governor
of the State of Montana,

Respondent.

PER CURIAM: ORDER

William F. Cashmore, M.D., as relator filed in this Court a verified application for declaratory judgment, alternative writ of injunction or other remedial relief, in cause No. 12309, entitled "THE STATE OF MONTANA, ex rel. WILLIAM F. CASHMORE, M.D., Relator, vs. FORREST H. ANDERSON, as Governor of the State of Montana, Respondent; thereafter and on the same day Stanley C. Burger, as a Petitioner, filed in this Court his application for declaratory judgment, alternate writ of injunction, alternate writ of prohibition and order to show cause in cause No. 12310, entitled "THE STATE OF MONTANA, ex rel. STANLEY C. BURGER, Petitioner, vs. FORREST H. ANDERSON, as Governor of the State of Montana, Respondent.

Counsel in both cases were heard ex parte and it appears that the relief sought in both actions is a determination of whether or not the new constitution voted on at the election of June 6, 1972, received the approval of a majority of the electors voting at the said election, it being contended that it did not receive such approval as required by Section 8, Article XIX of the Montana Constitution.

While a restraining order was sought to prohibit the respondent Governor from issuing any proclamation upon the election the Court was advised by counsel during the course of their ex parte arguments that the proclamation had been issued by the Governor.

It further appearing that the relief sought in each of the actions, as hereinbefore related, is similar, a motion was made for the consolidation of the actions, which motion was granted and it was ordered that causes numbered 12309 and 12310, each entitled as hereinbefore set forth, be consolidated under cause No. 12309, to be entitled as this Order is entitled, and the Clerk is directed to make such amendments to his records as required to evidence these changes.

Upon consideration of the allegations contained in the pleadings, the exhibits appended thereto, and the ex parte oral presentations before this Court, it would appear that the matters raised thereby are to secure interpretations of provisions of our present constitution in light of its wording and under precedents established in the case law of Montana and other states of the Union, and, further, that no fact questions arise which would require the taking of testimony, and in such a situation an adversary hearing before this court is all that would be required to present the legal issue for determination.

NOW THEREFORE, IT IS HEREBY ORDERED that this cause be set for an adversary hearing

before this Court on the 17th day of July, 1972, at the hour of 9:00 a.m.

IT IS FURTHER ORDERED that service of a copy of this Order, of the two applications now on file, with their exhibits, and any memorandums of authorities to be furnished by the relators, be served upon the HONORABLE FORREST H. ANDERSON, as Governor of the State of Montana, forthwith; and identical service of such documents shall be made upon HONORABLE ROBERT L. WOODAHL, as Attorney General of the State of Montana, forthwith.

IT IS FURTHER ORDERED that the respondent shall file such motions or other pleadings as is desired, and, without waiver, shall file his answers to the petitions in this cause, all such pleadings to be served and filed on or before three days before the date fixed for hearing herein.

In view of the statewide interest in the question here presented, applications for leave to intervene or to appear herein amicus curiae should be addressed to the Chief Justice and filed within ten days from the date of this Order. Intervenors may appear in oral argument upon application to the Court for time therefor; amicus curiae must apply to the Court for permission to present oral argument and such application must fully set forth the reasons for the application. Amicus curiae shall appear by brief.

Briefs of all parties may be in typewritten form, and shall be filed with the Clerk of this Court at least three days before the day set for argument. All briefs shall be served upon counsel for all parties who have previously appeared, but any group appearing shall be entitled to but one copy thereof, and law firms appearing shall likewise be entitled to but one copy. The names of all parties who

have previously appeared may be obtained from the office of the Clerk.

It appearing further that the members of the Constitutional Convention and/or the members of the primary election canvassing board may or may not be interested in appearing as parties in intervention or as amicus curiae, and for that reason copies of this order shall be served upon the president, first vice-president, eastern district vice-president, western district vice-president and secretary of the Constitutional Convention and upon the Governor, State Treasurer and Secretary of State, comprising the primary election canvassing board by mail.

Counsel will be notified of their time for argument at least 24 hours before the hearing.

DATED this 22nd day of June, 1972.

Appendix D

INSTRUCTIONS TO VOTERS: PLACE AN "X" IN THE BOXES WHICH EXPRESS YOUR PREFERENCES. THE FULL TEXT OF THE PROPOSED CONSTITUTION AND THE SEPARATE PROPOSITIONS IS AVAILABLE FOR INSPECTION AT YOUR POLLING PLACE. IF THE PROPOSED CONSTITUTION FAILS TO RECEIVE A MAJORITY OF THE VOTES CAST, ALTERNATE ISSUES ALSO FAIL.

OFFICIAL BALLOT

PROPOSED CONSTITUTION

PLEASE VOTE ON ALL FOUR ISSUES

1.
(Vote for One)

☐ **FOR** the proposed Constitution.

☐ **AGAINST** the proposed Constitution.

The proposed Constitution will include a bicameral (2 houses) legislature unless a majority of those voting in this election vote for a unicameral (1 house) legislature in Issue 2.

2.
(Vote for One)

☐ 2A. **FOR** a unicameral (1 house) legislature.

☐ 2B. **FOR** a bicameral (2 houses) legislature.

3.
(Vote for One)

☐ 3A. **FOR** allowing the people or the legislature to authorize gambling.

☐ 3B. **AGAINST** allowing the people or the legislature to authorize gambling.

4.
(Vote for One)

☐ 4A. **FOR** the death penalty.

☐ 4B. **AGAINST** the death penalty.

Appendix E

Office of the Secretary of State

OF THE

STATE OF MONTANA

CERTIFICATE OF THE ABSTRACT OF VOTES CAST FOR AND AGAINST THE PROPOSED CONSTITUTION AND THE SEPARATE PROPOSITIONS THEREON AT THE SEPARATE ELECTION APPOINTED BY THE CONSTITUTIONAL CONVENTION TO BE HELD SIMULTANEOUSLY WITH THE PRIMARY ELECTION IN THE STATE OF MONTANA ON

TUESDAY, JUNE 6, 1972

This is to certify that on Thursday, June 15, 1972 at 9:00 o'clock A.M., I, FRANK MURRAY, Secretary of State, in the presence of the Governor and State Treasurer proceeded in accordance with Chapter 296, Laws of Montana, 1971, as amended by Extraordinary Chapter 1, Laws of Montana, 1971, and Resolution No. 11 of the Constitutional Convention, adopted March 4, 1972, to canvass the votes cast at the Election held in the State of Montana on Tuesday, the Sixth day of June, A.D. 1972, for and against the proposed Constitution and the Separate Propositions thereon, as set forth within.

NOW, THEREFORE, I, FRANK MURRAY, Secretary of State, do hereby certify that the following

is a true, correct and complete statement of the number of votes cast for and against the proposed Constitution and Separate Proposition thereon and of the number of electors voting at the election hereinabove referred to, and that I have computed and determined the votes from the abstracts transmitted to the Secretary of State by the County Clerks of all fifty-six counties in the State of Montana, and I declare the result to be as follows:

FOR the proposed Constitution.	116,415
AGAINST the proposed Constitution.	113,883
2A. FOR a unicameral (1 house) legislature.	95,259
2B. FOR a bicameral (2 houses) legislature.	122,425
3A. FOR allowing the people or the legislature to authorize gambling.	139,382
3B. AGAINST allowing the people or the legislature to authorize gambling.	88,743
4A. FOR the death penalty.	147,023
4B. AGAINST the death penalty.	77,733
Total number of electors voting.	237,600

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Montana, at Helena, the Capital, this twentieth day of June, A.D. 1972.

(S) FRANK MURRAY
Frank Murray
Secretary of State

(S) FORREST H. ANDERSON
Forrest H. Anderson—Governor

(S) ALEX B. STEPHENSON
Alex B. Stephenson—State Treasurer

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Carl M. Smith, Walter Hope,
Jess J. Blankenship, and
Herbert J. Klindt

PROOF OF SERVICE

I, JAMES H. MORROW, JR., one of the Attorneys for Stanley C. Burger, the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of December, 1972, I served copies of the foregoing Petition for Writ of Certiorari of the Decision of the Supreme Court of the State of Montana on the several parties thereto, pursuant to Rule 33, as follows:

To Respondent, Forrest H. Anderson, as Governor of the State of Montana, by mailing copies in a duly addressed envelope with first-class postage pre-paid at address of State Capitol Building, Helena, Montana 59601.

To Relator and Respondent William F. Cashmore, M.D., and Intervenors and Respondents Leo Graybill, Jr., John Toole, Bruce Brown, Dorothy Eck, and Jean Bowman, Robert L. Kelleher, Pro Se, State of Montana and Forrest H. Anderson, Governor, and Dave M. Manning, Clyde Hawks, Carl M. Smith, Walter Hope, Jess J. Blankenship, and Herbert J. Klindt, by mailing copies in duly addressed envelopes with first-class postage pre-paid to their respective attorneys of record, as follows:

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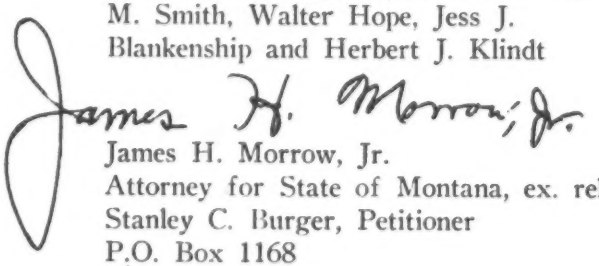
Attorneys for Respondents,
Dave M. Manning, Clyde Hawks, Carl M. Smith, Walter Hope, Jess J. Blankenship and Herbert J. Klindt



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No. 72-910

In the

Supreme Court of the United States

THE STATE OF MONTANA, ex rel.
STANLEY C. BURGER,
Petitioner,

vs.

FORREST H. ANDERSON,
as Governor of the State of Montana,
Respondent,

and

WILLIAM F. CASHMORE, M.D.,
Relator-Respondent,

LEO GRAYBILL, JR., JOHN TOOLE, BRUCE BROWN, DOROTHY ECK, and JEAN BOWMAN,
Intervenors-Respondents,

STATE OF MONTANA and
FORREST H. ANDERSON, Governor, and
ROBERT L. WOODAHL, Attorney General,
Intervenors-Respondents,

DAVE M. MANNING, CLYDE HAWKS,
CARL M. SMITH, WALTER HOPE,
JESS J. BLANKENSHIP and HERBERT J. KLINDT,
Intervenors-Respondents.

Respondents' Brief in Opposition

TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The material facts are as follows:

The Montana Legislature by Chapter 65, Laws of 1969, provided for a referendum election on the issue of calling a constitutional convention pursuant to Article XIX, section 8, Montana Constitution (pp. 3-4, Pet.). At an election held November 3, 1970, the calling of a constitutional convention to revise, alter or amend the present constitution was approved. The legislature passed the necessary enabling act, Chapter 1, Extraordinary Laws of 1971, for such convention. After election of delegates on November 2, 1971, the convention convened, held hearings, debated and agreed upon a proposed 1972 constitution. The proposal was submitted to the electors at a special election held in conjunction with the primary election on June 6, 1972. The ballot contained four issues (pp. 6-7, Pet.).

Following the election, the returns were canvassed by the state canvassing board and the results were contained in a certificate of the abstract of the votes by the Secretary of State (p. 8, Pet.). The Governor proclaimed the proposed 1972 constitution approved and adopted.

On the same day as the Governor's proclamation, petitioner filed an original proceeding in the Montana Supreme Court seeking a declaratory judgment that the 1972 constitution was not ratified and adopted because it was not "approved by a majority of the electors voting at the election" as required by Article XIX, section 8 of the 1889 constitution. A similar action was filed by respondent William F. Cashmore. The Governor was named sole defendant in both actions.

By order dated June 22, 1972 (pp. 77-80, Pet.), the Montana Supreme Court accepted original jurisdiction, ordered the actions consolidated, and set the consolidated action for adversary hearing. Prior to hearing, an answer was filed by the Governor, a complaint in intervention

was filed, the Attorney General intervened as an additional respondent and filed a separate answer, and answers were filed to intervenors' complaint by the Attorney General and other intervenor respondents. Twenty written briefs were filed by the parties, intervenors and *amici curiae*, and oral argument was had.

On August 18, 1972, the court decided by 3 to 2 that the 1972 constitution was properly passed by a majority of the electors voting. The court held that the language relied on by petitioner and other opponents of the 1972 constitution was inherently ambiguous when read in connection with all of Article XIX, section 8, 1889 constitution (pp. 3-4, Pet.). Because of the ambiguity, the court interpreted the section in a manner which accorded with a natural right, majority vote, and indicated that before it would accept the opponents' arguments which would require an extraordinary majority, the constitutional requirement must be clearly required. The court stated that to accept the extraordinary majority principle would give a nonvoter on a particular issue the status of a negative voter which, absent a clear constitutional requirement, it refused to do. Recognizing that the several states are in conflict concerning the meaning of the phrase "majority of electors voting", the court rejected consideration of foreign jurisdiction case law and relied on two earlier Montana cases adopting the majority rule principle.

The Montana court stated:

> "Additionally, we must consider the policy and philosophy of government contained in our Constitution as enunciated in numerous cases including Tinkel v. Griffin, 26 Mont. 426, 68 P. 859. There the Court said:
>
> " 'The expression "majority of the electors thereof voting at an election," etc., clearly means a majority of those who vote, *and not a majority* of all of the electors of the county, or *of those who vote upon any other issue,* at

> the same or some other time.' (Emphasis added)
>
> "The philosophy of our Constitution was further explained in this language from *Tinkel:*
>
> " 'It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence.' * * *" (pp. 40-41, Pet.)

On September 5, 1972, petitioner filed a petition for rehearing with the Montana Supreme Court as did relator Cashmore. After briefs were filed by all sides, the Montana Supreme Court denied the petitions 3 to 2 on September 25, 1972.

On December 21, 1972, a Petition for a Writ of Certiorari was docketed before this court.

REASONS AGAINST GRANTING THE WRIT

1. Petitioner Has Not Met the Jurisdictional Requisites of 28 U.S.C. §1257 (3), nor the Requirements of this Court, 28 U.S.C. Supreme Court Rules 19(1), That the Constitutional Validity of a State Statute Be Drawn in Question by the State Court and Requiring the Presence of a Federal Question of Substance.

The petition is made under 28 U.S.C. §1257 (3), providing for the granting of a writ of certiorari when the validity of a state statute is drawn in question in state court on the ground of its being repugnant to the Constitution of the United States. Rule 19 (1) of this court provides that a review on writ of certiorari will be granted only where there are special or important reasons such as where a state court decided a federal question of substance.

Before this court can invoke its jurisdiction by certiorari, a federal question must be raised in state court. *Ellis v. Dixon,* 349 U.S. 458, 99 L.Ed. 1231, 75 S.Ct. 850, rehearing denied 350 U.S. 855, 100 L.Ed. 759, 76 S.Ct. 37.

Petitioner alleges that federal questions were raised by him, intervenor Manning, *amicus* Longan, and *amicus* Scribner (p. 10, Pet.). An examination of the record clearly shows that at no time was a federal question presented to the state court by petitioner, nor was reference made to the Constitution, treaties or laws of the United States in any of the briefs cited. Even if there were federal questions raised by intervenors or *amici*, petitioner has no standing to raise those questions where he did not raise the same federal question in the state court. *Puget Sound Power etc. Co. v. King County, Wash.*, 264 U.S. 22, 25, 68 L.Ed. 541, 545, 44 S.Ct. 261 (1924).

Intervenor Manning, et al. (R. document 38; R. document 45, 11-13), *amicus* Scribner (R. document 47, 6-8), and petitioner (R. document 63, 9-11), all speak to the issue of whether voters were properly informed concerning the value of their vote. At no time in the documents cited above, however, was the issue raised that either the equal protection or due process principles of the Fourteenth Amendment to the Constitution were violated. Petitioner now attempts to raise that constitutional issue (pp. 16-21, Pet.) for the first time.

Assuming that a federal question was raised by the briefs cited, albeit indirectly, it is readily apparent why the Montana court did not discuss the question of misrepresentation to voters. Petitioner discussed four instances where he contended the voters were misinformed: First, the legislature used the language of the 1889 constitution concerning the method of voting on the 1972 constitution; Second, several delegates to the constitutional convention signed an unofficial advertisement explaining the 1972 constitution; Third, the language for constitutional revision in the 1972 constitution is more specific than that of the 1889 constitution; and Fourth, another issue found on the official ballot had an explanation that it would not be adopted unless a majority of those voting in the election voted for it (R. document 63, pp. 9-11).

No testimony was ever introduced that a single Montanan relied on the representations alleged by petitioner. No suggestion was ever made in the briefs filed before the initial hearing of this cause or in the briefs in support of rehearing that citizens of Montana were denied the equal protection of the laws or due process of law by the representations allegedly made.

Petitioner states that a federal question was raised by *amicus* Franklin Longan (R. document 57, p. 2). *Amicus* Longan raised no constitutional issues in his brief.

The only brief cited by petitioner which validly raised constitutional issues is that of intervenor Robert L. Woodahl, counsel for the Governor and executive branch of state government (R. document 55, pp. 19-20). In that brief, respondent argued against petitioner's theory that Article XIX, section 8 of the Montana Constitution (pp. 3-4, Pet.) required a majority of the total number of electors appearing at the polls before passage of the 1972 constitution. Respondent argued that that theory would give a ballot blank on the issue of adoption of the constitution the effect of a negative vote. This we contended would dilute the weight of the total number of yes votes cast and would violate the rights of citizens of Montana to the equal protection of the laws in that the principle of one vote for one man would be abrogated.

The Montana Supreme Court recognized that this issue had been raised by the respondent (p. 34, Appendix A, Pet.), but did not reach the question because it reached its decision through application of state law in a manner that did not dilute the vote.

The argument now raised by petitioner concerning the dilution of votes is one entirely different from that posed by respondent in the Montana court (pp. 20-21, Pet.). Petitioner argues that citizens may have opted not to vote on the issue thinking that in so doing they were casting a negative vote. They assert that for the Mon-

tana court to only count actual votes cast dilutes the value of a citizen's choice not to vote. We have pointed out that there was absolutely no evidence introduced that any citizen exercised that option. Further, that issue was never raised in the Montana Supreme Court.

The only issue which petitioner claims to have raised in state court is that of alleged misrepresentation to voters. In his discussion of reasons for granting the writ (pp. 11-25, Pet.), petitioner now raises a number of constitutional issues which were not presented to the state court. This court has held that where only one constitutional question has been raised in state court, petitioner cannot raise new issues in a petition for review. *Dewey v. Des Moines,* 173 U.S. 193, 196-200, 43 L.Ed. 665, 666-667, 19 S.Ct. 379 (1899).

CONCLUSION

An examination of the record shows that petitioner did not raise a federal question in state court. He now attempts to rely on language of other parties, both proponents and opponents of the adoption of the 1972 Montana constitution. A party may not rely on federal questions he did not raise in state court. No federal question was raised by the opponents of the adoption of the 1972 Montana constitution. The only federal question squarely raised which was cited by petitioner was raised by respondent Robert L. Woodahl. That question was not reached by the state court because the decision was correctly decided based on state law. Petitioner now attempts to raise a number of new federal questions which were not raised in state court. The writ should not issue.

Respectfully submitted,

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PROOF OF SERVICE

I, ROBERT L. WOODAHL, Attorney General of Montana, one of the attorneys for the respondents, Forrest H. Anderson, Leo Graybill, Jr., et al., Robert L. Kelleher, and State of Montana, et al., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of January, 1973, I served copies of the foregoing Respondents' Brief In Opposition To Petition For Writ Of Certiorari on the several parties thereto, pursuant to Rule 33, as follows:

To Petitioner, Stanley C. Burger, by mailing copies in a duly addressed envelope with first-class postage prepaid to one of his attorneys of record:

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To respondents William F. Cashmore, M.D., and Dave M. Manning, Clyde Hawks, Carl M.

Smith, Walter Hope, Jess J. Blankenship and Herbert J. Klindt, by mailing copies in duly addressed envelopes with first-class postage prepaid to their respective attorneys of record as follows:

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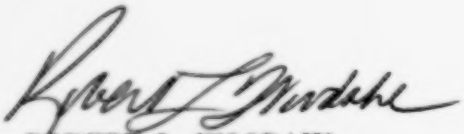

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FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-910

THE STATE OF MONTANA, EX. REL. STANLEY C. BURRER,
Petitioner,

v.

FORREST H. ANDERSON, as Governor of the State of Montana, et al.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

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PETITIONER'S REPLY MEMORANDUM

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---

PETITIONER'S REPLY MEMORANDUM

INTRODUCTION

The objecting Respondents, in their Brief, do not really deny that the Governor of Montana and the majority members of the Montana Supreme Court violated the due process clause of the Fourteenth Amendment to the United States Constitution by holding the proposed new Constitution for the State of Montana was validly adopted under Article XIX, Section 8 of the Montana Constitution.

The Respondents merely seek to discourage this Court from reviewing the merits of these clear viola-

tions of the Fourteenth Amendment upon narrow procedural grounds. The Petitioner would reply as follows:

1. RAISING FEDERAL QUESTIONS

(a) First Issue

Respondents cite no decision of this Court, or any other court, that when the majority of the Montana Supreme Court is arbitrary and capricious in its decision this must be directly put to that Court for their review before this issue can be raised in this Court. This issue concerning a State Supreme Court's violation of the Fourteenth Amendment of the United States Constitution arises by that Court's arbitrariness and capriciousness in arriving at its conclusions. If a Court has chosen this course of procedure, the problem will not be solved by permitting that same Court to judge itself. The law does not require an idle act. It is sufficient to point out to that Court the errors in their conclusions on the facts and the law. This the Petitioner and others did in the exhaustive briefs and arguments prior to the decision, and later in briefs and Petition for Rehearing. Therefore, the First Issue raised by Petitioner is properly before this Court for review, and it is submitted that this issue is so unique and important to all concerned, that it is reason enough for this Court to grant a Writ of Certiorari.

(b) Second Issue

Respondents raise the issue of whether Petitioner has standing to raise the Federal issue of whether the majority decision of the Supreme Court of Montana and the Proclamation of the Governor of Montana directly conflicts with the due process and equal protection principles enunciated in the *Kohler* decision.

The Respondents do not deny that the factual issues were raised by several of the parties and amicus curiae. The Respondents admit that the issue of the Fourteenth Amendment and dilution of votes was squarely before the Court, because they acknowledge raising these issues themselves. Examples of specifically naming the Fourteenth Amendment and discussion of *Reynolds* v. *Sims* are to be found in the briefs of intervenors Robert L. Kelleher and Leo Graybill, Jr., et al. (Document 34, Pages 2 and 3, and Document 49, Page 30 et seq. respectively, of Montana Supreme Court Records), and Brief of Amicus Curiae on behalf of Montana Citizens Committee on the State Legislature (Document 54 of the same record). Further, the Respondents admit that Petitioner's issues were, at least, raised indirectly. (Page 5 of Brief of Respondents in Opposition) Thus, the objectors really don't deny that the Federal issues were presented to the Montana Supreme Court by one or more of the various parties and amicus curiae, but merely hope to rely on a procedural claim that the Federal issues were not raised by Stanley C. Burger. (Page 5 of Brief of Respondents in Opposition).

First of all, these results were brought to the attention of the Montana Supreme Court by Petitioner in his Petition for Rehearing, and, further, the majority of the Court, in its own opinion, recognized that the issues were present and were being considered. (See Pages 32 through 34 of Majority Opinion, found in Exhibit A of Petition).

Secondly, however, the rule of standing to raise issues raised by third parties as stated in *Puget Sound Power etc. Co.* v. *King County, Wash.,* 264 U.S. 22, 25, 68 L.Ed. 541, 545, 44 S.Ct. 261, has been explained by this

Court in *Barrows* v. *Jackson*, 346 U.S. 249, 257, 97 L.Ed. 1586, 73 S.Ct. 1031, to be "only a rule of practice", and it will not be applied when "the reasons which underline our rule denying standing to raise another's rights . . . are outweighed by the need to protect the fundamental rights which would (otherwise) be denied." Here, the Montana Supreme Court, in its Order dated June 22, 1972, not only consolidated two companion actions filed by this Petitioner and William F. Cashmore, M.D., but also set forth provisions for other persons to seek leave to intervene and to appear amicus curiae "in view of the statewide interest in the question here presented. . ." (See Appendix C of Petition for Writ of Certiorari) Four separate groups of persons chose to intervene, and numerous others filed Briefs Amicus Curiae. The several briefs covered the question of the adoption of the proposed Constitution from many different arguments and positions on behalf of all the electors of Montana and it is obvious, from a review of these briefs, that the various parties tried not to repeat everything the other briefs had discussed and argued. At the time of oral argument, the Court further ordered that oral argument could be presented by the parties who had been allowed to intervene, and then only after application to the Montana Supreme Court. Therefore, at the time of oral argument, the Court allowed five attorneys to present argument for and five attorneys to present argument against the adoption of the Constitution (Document 36 of Record of Montana Supreme Court) and, thus, counsel presented arguments by the various parties and amicus curiae consistent with the position of their clients. So, too, Stanley C. Burger did present and adopt arguments presented in written briefs by such amicus curiae as Gerald J. Neely, Franklin Longan,

and A. W. Scribner, as well as David M. Manning, et al., and William F. Cashmore, M.D., Parties.

In numerous cases, this Court has allowed a party to challenge the decision of a lower Court on issues allegedly belonging also to some other party. See *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 459, 2 L.Ed. 2d 1488, 78 S.Ct. 1168, *Bates* v. *Little Rock,* 361 U.S. 516, 523, 4 L.Ed. 2d 480, 80 S.Ct. 412, *Communist Party* v. *Subversive Activities Control Board,* 367, U.S. 1, 81, *Griswold* v. *Connecticut,* 381 U.S. 479, 481, 14 L.Ed. 2d 510, 85 S.Ct. 1678.

In summary, the Montana Supreme Court made it clear it would entertain the thoughts and opinions by as many persons as would care to present them in Court, on the issue of the new proposed Constitution, because of the admitted statewide interest concerning its adoption. Under these circumstances, any rule of restraint by this Court is outweighed by the obvious fact that the people of Montana and the rest of this country need the protection by this Court of their fundamental voting rights. The fact that the Federal issues may have been more specifically raised by one of the multitude of other parties or amicus curiae, rather than this Petitioner, should not prevent this Court from making a review of the merits of this case. This Petitioner, like all the other parties and amicus curiae, seeks only to determine and protect the voting rights of the electors of Montana. This Court has stated that the determination of who may invoke Federal Constitutional rights is one to be made ultimately by this Court (*United States* v. *Raines,* 362 U.S. 17, 23, 4 L.Ed. 2d 524, 80 S.Ct. 519) and the controlling question then becomes whether the party "has sustained or is immediately in danger as sustaining some direct injury as the

result of the enforcement . . . " *Massachusetts* v. *Mellon*, 262 U.S. 447, 488, 67 L.Ed. 1078. Standing has never been uniformly imposed as a firm constitutional restriction of Federal Court jurisdiction. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 486, 14 L.Ed. 2d 22, 85 S.Ct. 1116, *Barrows* v. *Jackson*, 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031, *Flast* v. *Cohen*, 392 U.S. 83, 99. The only rule insisted upon by this Court is that the party seeking review of a state court decision "must show that enforcement of the challenged judgment would deprive it of some right arising under the Constitution or laws of the United States properly asserted below." *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-op*, 276 U.S. 71, 88, 72 L.Ed. 473, 48 S.Ct. 291. There is no question that this Petitioner as an elector, taxpayer and resident of Montana and citizen of the United States, is one whose rights have been deprived and violated by the decision of the majority of the Montana Supreme Court. The rights in question are that the people of the state are now to be governed by a new Constitution, which was not lawfully adopted. He has standing to object.

In addition to the previous citations of where the Federal issues were raised, (See Page 10 of Petition for Writ of Certiorari), this Court's attention is directed to the Brief of Gerald J. Neely, as amicus curiae on his own behalf (Document Number 43 of the Record of the Montana Supreme Court), wherein on Pages 4 through 9, Mr. Neely fully discusses the issue he had raised under the topic of "The Recent Montana Constitutional Convention Either Knew That an Extraordinary Majority was Required, or The Voters Were Misled." It was Mr. Neely who first pointed out to the Montana Supreme Court that for the Respondent parties to now urge that the phrase "majority of

the electors voting at the election" should be construed as allowing for a simple plurality was "somewhat like changing the rules of the game after the game has been played." This, too, is what your current Petitioner urges is a violation of the Fourteenth Amendment to the United States Constitution.

In summary, considering the importance of the situation presented to this Court, of whether Montana is to be governed by a new Constitution that was never legally or properly adopted by a majority of the electors of Montana voting at the special election on June 6, 1972; and considering the fact that Issue Number 1 does not need to be raised by Petitioner in the Montana Supreme Court, in any different means than how it was raised; and considering that the other issues concerning the Fourteenth Amendment and dilution of votes by changing the rules of the game after the game was over were raised by numerous parties before the Montana Supreme Court; and considering the procedure used by the Montana Supreme Court in determining the ultimate issue in this case—whether the Constitution was adopted—this Petitioner does have standing to present these matters for review by this Court.

2. RETROACTIVE DILUTION OF VOTING RIGHTS

The Respondents now propose that, by virtue of the Montana Supreme Court's holding that a simple majority vote is a "natural right", the phrase "majority of the electors voting at the election" can be properly interpreted as meaning only a "majority of the electors voting on the issue", regardless of the fact that this interpretation changes the effect of the electors' voting decision after those decision have been made. (See Page 3, Respondents' Brief in Opposition)

Regardless of how the Montana Supreme Court arrived at its decision of interpreting the language differently from its clear, literal meaning, the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution still do not allow the State to change the effect of the electors' voting decision after the election has been held, by retroactively changing the meaning of the language controlling the adoption of the issues before the people. The Respondents now claim that this issue should not be considered because no evidence was presented that a particular elector in Montana voted in reliance upon these representations. The Respondents misunderstand the claim of Petitioner and fail to recognize the law as stated in *Kohler* v. *Tugwell,* 292 F.Supp. 978, *affirmed by this Court in* 89 S.Ct. 879, 393 U.S. 531, 21 L.Ed. 2d 755 cited to this Court on Page 16 of Petition for Writ of Certiorari. In the *Kohler* decision, the Court recognized that the Fourteenth Amendment of the United States Constitution simply doesn't allow the retroactive dilution of votes by state action such as by changing the rules of the game after the game was played. The amendment prohibitions are against certain actions by state officials and there need be no specific reliance by any particular individual, as in the situation of a claim of fraud.

As recognized by the majority opinion, as found at Page 44 of Petition, from just a cursory examination of the voting in eighteen counties, it was obvious that 290 more electors voted for ballot Issue Number 3, concerning gambling, than voted on ballot Issue Number 1, on the basic Constitution. There can be no question that at least these electors assumed that they did not have to vote on all issues, in order to affect their outcome, as specifically stated on the ballot. Therefore,

even if evidence was important to show a reliance upon the representation, there was ample evidence before the Court.

In the Petition for Writ of Certiorari, this Petitioner has set forth the numerous representations made prior to the election by the State Legislature, the newspaper supplements, the State Supreme Court and the Constitutional Convention, as to how the various issues would or would not be adopted by the electors at the election. The Constitutional Convention even went to the extent of specifically setting this forth on the ballot, when they inserted the box explanation that:

> "The proposed Constitution will include a bicameral (2 houses) legislature unless a majority of those voting in this election vote for a unicameral (1 house) legislature in Issue 2."

(a) Transcript of Proceedings of Montana Constitutional Convention

A startlingly new fact has just been discovered. Neither at the time of the hearing before the Montana Supreme Court nor at the time of the Petition for Writ of Certiorari had there been published the Official Transcript of the Proceedings of the Montana Constitutional Convention. Within this past month, however, such Transcript has been completed, and a copy is now on file with the Library of Congress, in Washington, D. C., as well as with the library of the Montana Supreme Court. In this Transcript, it is revealed, in the clearest of detail, that the members of the Constitutional Convention believed that the Constitutional requirement of "a majority of the electors voting at the election" meant just what it says, and that they placed

the explanation in the box on the ballot so that the electors of Montana would know that even though each of the four issues might receive a simple plurality, that such issue would be approved only if it received a majority of the electors voting at the election. The discussion of preparing the ballot and the adoption schedule so as to not mislead the voters is contained in over 400 pages of the Transcript as the delegate lawyers, including Chairman Graybill, one of the Respondents herein, took turns explaining the language of Section 8 of Article XIX of the Montana Constitution and how it regards "a majority of the electors voting at the election" as necessary to obtain approval of any of the issues to be presented, and why a single plurality was not sufficient. For example, as written at Page 8818, Lines 14 to 25, of Volume XII of the Official Transcript, Mr. Graybill stated:

> "... the problem started in 1889 when the amendatory process, which included a provision for a constitutional convention, which we are using today, said—and unless submitted and so approved by a majority of electors voting at the election, no such revision, alteration or amendment shall take effect. That's why the Enabling Act says you've got to have a majority on every proposition, because the founding fathers said that. And they said that because they felt very strongly that a majority should support anything we do. It's not a mistake. It's just what they said."

Mr. Schiltz, the Chairman of the Style and Drafting Committee, using a blackboard, explained the mathematical requirements of a majority voting at the election. He used the figure of 200,000 electors voting and related that if only 96,000 voted for choice number I and 94,000 for choice number II, that neither would

carry. (Pages 8694 of Volume XII of Transcript of Proceedings of Montana Constitutional Convention) As another example, Delegate Brown, one of the objecting Respondents herein, proposed the placing of the explanation on the ballot, which proposal was approved by a vote of 73 Aye and 13 Nay, and in explaining the purpose of his proposal, as to why it was necessary that the explanation be put in the box on the ballot:

> "DELEGATE BROWN: . . . It seems to be the sense of the people here that if you had fifty percent plus one vote for the Constitution, but below there you had forty-eight percent for unicameral and thirty-two percent for bicameral, then the unicameral would not carry, but the people of Montana would be thoroughly confused and say, we voted for a unicameral, why didn't we get it? So, we want to put right on the ballot—we can show them the ballot and say, here, it says a majority of those voting, so the people won't misunderstand. In other words, I'm afraid that if you just say a majority votes for unicameral, they will think they have carried unicameral when in fact they haven't." (Page 9004 of Volume XII of the Official Transcript of the Proceedings of the Montana Constitutional Convention)

As this Court should note, five (5) of the delegates to the Constitutional Convention, including the Chairman Leo Graybill, Jr., and delegates John Toole, Dorothy Eck, Jean Bowman and Bruce Brown, the author of the above referred to proposal, all being convention officers, and all appearing in the Supreme Court proceedings, have maintained in their pleadings and briefs that the proposed Constitution should be adopted, because the language "majority of the electors voting at the election" does not mean what it says, but should

be construed to mean that a simple plurality is all that is necessary for an issue to be approved. (See Documents Numbered 49 and 53 of the Record of the Montana Supreme Court) At no time did any of these delegates inform the Montana Supreme Court that they had debated this very issue for two days of the convention during March 21 and 22, 1972, and that they had concluded that they would represent to the electors that more than a simple plurality would be necessary for any of the issues to be adopted on the ballot. All but Delegate Eck voted "Aye" on Mr. Brown's above proposal. (See Pages 8692 through 9094 of the Proceedings of the Montana Constitutional Convention Volume XII)

These delegates had been invited by the Montana Supreme Court to appear before the Court to assist the Court in declaring whether the proposed new Constitution was adopted or not. (See Order of Montana Supreme Court, dated June 22, 1972, Appendix C of Petition for Writ of Certiorari) Yet, these very delegates, rather than advising the Court as to the debates and decisions by the Constitutional Convention, perpetrated a hoax upon the Montana Supreme Court by remaining silent as to what had taken place, and, in fact, urged the Court to make a declaration completely opposite from what they and the rest of the Constitutional Convention had intended to represent to the electors who were going to the polls to vote on the issues presented at the election. This Petitioner urges this Court to take judicial notice of the Official Transcript of the Proceedings of Montana Constitutional Convention and accept this Petition for Writ of Certiorari and decide the merits of the issues presented here, or at least order that this matter be remanded to the Montana Supreme Court for further consideration, in view of

the evidence in the Official Transcript of the Proceedings of the Constitutional Convention which has just recently been published, and which was not available to the Montana Supreme Court at the time of its deliberations.

3. VOTING RIGHTS

It is submitted that the language of Section 8 of Article XIX of the Montana Constitution "and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect" creates a valid voting right of all electors. This right is that an elector is entitled to have his vote affect the outcome of the issues of election, when he votes on one or more of the issues submitted at the election, but elects not to vote on the issue in question, which, in this case, was Issue Number 1, being the proposed Constitution.

In the case of *Stoliker* v. *White,* 359 Mich. 65, 101 N.W. 2d 299, 300, cited by the minority opinion of the Montana Supreme Court at Pages 59 and 60 of Appendix A to Petition for Writ of Certiorari, the Michigan Supreme Court recognized this voting right and stated:

> "When the people went to the polls in 1958 to vote upon the question of a constitutional convention, they went with a contemporaneous understanding that a failure to vote upon the constitutional question would have the practical effect of a vote in the negative thereof."

The Michigan Court went on to hold the language "majority of such electors voting at such election" required more than a simple majority vote to call a constitutional question.

The Arizona Supreme Court recognized this voting right in the case of *Adams* v. *Bolin,* 247 P. 2d 617, 74 Ariz. 269, 33 ALR 2d 1102, wherein the Court cited with approval the Wyoming Supreme Court decision of *State ex. rel. Blair* v. *Brooks,* 17 Wyo. 344, 99 P. 874, which was concerned with the requirement of a "majority of the electors" in the Wyoming Constitution, and which Court characterized those who voted on certain issues but not on the constitutional issue and held:

> "Any other construction would authorize the counting of all who did not vote on the question as in favor of the adoption, a construction which is not borne out by the language nor is it in harmony with the spirit of the constitution."

To the same effect is the old Nebraska case of *State* v. *Babcock,* 22 N.W. 372:

> "The language of Section of Article 15 is that 'if a majority of the electors voting at such election adopts such amendments, the same shall become a part of this constitution.' This would seem to require a majority of all votes cast at that election, otherwise the words 'voting at such election' would be entirely without meaning. But these words evidently were intended as a restriction upon the right to change the fundamental law, and not permit a minority of the people of the state to incorporate new provisions therein * * * In this case an amendment to the constitution will be adopted 'if a majority of the electors voting at such election adopt' the same. This requires affirmative action. A majority of all those voting at the election must vote in favor of the proposition in order to adopt the same. The convention that framed the constitution doubtless presumed that if an amendment was necessary and really desired by the people, a majority would favor its adoption."

All of these Courts recognized that the particular language used in their Constitutions did create a voting right in the electors to have their vote have the effect as set forth in the various Constitutions, even though the Constitutional provisions might require something more than a simple majority or plurality before adoption of the issue in question.

The majority opinion of the Montana Supreme Court and its theory of "natural right" is in direct conflict with those decisions. The United States Supreme Court should also resolve this conflict.

CONCLUSION

It shocks the public conscience that officials of Montana would participate in improperly declaring the adoption of a new Constitution for the State of Montana, when such Constitution failed to be approved by a majority of the electors voting at the election. Perhaps the errors of the Montana Court can be explained in view of the newly discovered facts set forth in the transcript of the Proceedings of the Montana Constitutional Convention. There it is disclosed that the officers and members of the Montana Constitutional Convention understood the plain meaning of the phrase in Section 8 of Article XIX of the Montana Constitution, "majority of the electors voting at the election", and the stated, specific intent of the Convention was that the electors were to be specially advised of such result of their voting decision, i.e. that issues would pass only if they received approval by a majority of the electors voting at the election and would not pass if the issue received only a plurality of those voting on the issue. Yet, at the time of the hearing before the Montana Court, these officers and members of the Con-

stitutional Convention failed to disclose these facts to the Court, and urged that the document of their labor should be adopted even though it did not receive approval by a majority of the electors voting at the election. This was unconscionable and this Court must aid in the correction of such an injustice to the electors of Montana.

Further, however, the issues presented for review by the Petition for Writ of Certiorari concerning the dilution of the voting rights of electors by state officials retroactively changing the effect of an elector's voting decision, after the decision was made, in violation of the Fourteenth Amendment, has special importance not just to electors in Montana, but to electors in at least ten other states. The wording of the Montana Constitution respecting the vote necessary for amendment is not singular. Almost identical language is found in the Constitutions of Alabama, Alaska, Arkansas, Illinois, Minnesota and Oklahoma. Closely similar language is found in the Constitutions of Idaho, Mississippi, North Carolina and Wyoming.

Can the officials of these states, whether it be the executive, legislature, Courts, or Constitutional Conventions, represent to the electors on the ballot or otherwise, prior to the election, what affect a voting decision would have and then after the election, change by proclamation or decision, the effect of such decision? Hopefully, all electors are protected by the due process and equal protection laws of the United States Constitution from such action by state officials. This fundamental right can be firmly established and protected by this Court by its issuance of a Writ of Certiorari. Otherwise, inaction by this Court may suggest to state officials elsewhere that they may cause election

results to better suit their preferences, regardless of the prior representations to the electors and Constitutional guarantees.

This Court should grant this Writ of Certiorari and determine the issue of whether, under the facts, the proposed Constitution was properly adopted, or whether the whole election is invalid, and a new election should be held, or determine that these proceedings should be remanded to the Montana Supreme Court for further consideration.

Respectfully submitted,

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